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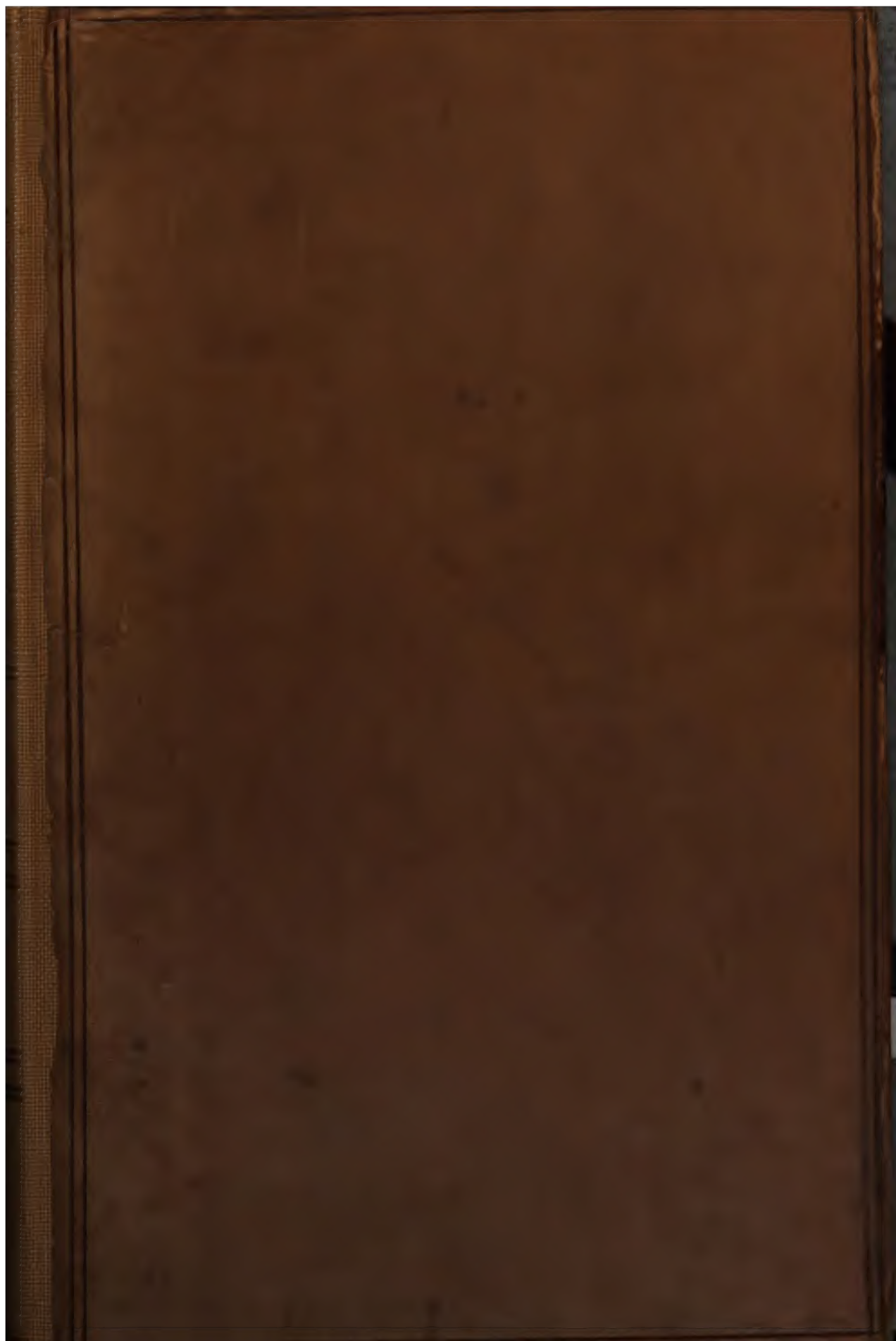
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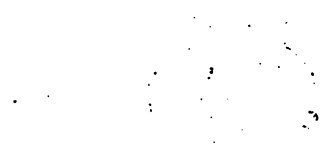












REPORTS OF CASES  
DECIDED IN THE  
HIGH COURT OF CHANCERY,

IN 1853 AND 1854,

BY

SIR RICHARD TORIN KINDERSLEY,  
VICE-CHANCELLOR.

BY

CHARLES STEWART DREWRY, ESQ.,  
OF THE INNER TEMPLE, BARRISTER-AT-LAW.

VOL. II.

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LONDON:  
V. & R. STEVENS AND G. S. NORTON,  
*Law Booksellers and Publishers,*  
*(Successors to the late J. & W. T. CLARKE, of Portugal Street,)*  
26, BELL YARD, LINCOLN'S INN;  
AND HODGES & SMITH, GRAFTON STREET, DUBLIN.

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**PRINTED BY C. ROWORTH AND SONS,**  
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**IN THIS VOLUME.**





E.		M.	
	Page		Page
East, Way <i>v.</i>	44	Major <i>v.</i> Major	281
Essex, Cadogan <i>v.</i> Lord	227	Micklethwaite, Hodson <i>v.</i>	294
		Middleton, Cox <i>v.</i>	209
F.		N.	
Fitzhenry <i>v.</i> Bonner	36	Newton <i>v.</i> Chorlton	333
Footner <i>v.</i> Cooper	7	Nottley <i>v.</i> Palmer	93
G.		P.	
Gilbertson, Taylor <i>v.</i>	391	Palmer, Nottley <i>v.</i>	93
Grant, Wynch <i>v.</i>	312	Palmer <i>v.</i> Simmonds	221
Gregson, Cook <i>v.</i>	286	Pococke, Smith <i>v.</i>	197
Gresham, Wiles <i>v.</i>	258	Potts <i>v.</i> Levy	272
H.		Procter <i>v.</i> Cooper	1
Hall, Commerell <i>v.</i>	194	Pryce <i>v.</i> Bury	11, 41
Hardingham <i>v.</i> Thomas	353		
Hodson <i>v.</i> Micklethwaite	294	R.	
Hooper, Rogers <i>v.</i>	97	Ramsden <i>v.</i> Smith	298
J.		Rice <i>v.</i> Rice	73
Jenkins <i>v.</i> Robertson	351	Richardson, Saunders <i>v.</i>	128
Jersey, Bishop <i>v.</i> Countess of	143	Richardson, Taylor <i>v.</i>	16
Judge, Thompson <i>v.</i>	414	Robertson, Jenkins <i>v.</i>	351
		Rogers <i>v.</i> Hooper	97
L.		S.	
Lawrence, Tracey <i>v.</i>	403	Sanders, Carter <i>v.</i>	248
Levy, Potts <i>v.</i>	272	Saunders <i>v.</i> Richardson	128
Lord <i>v.</i> Colvin	205	Simmonds, Palmer <i>v.</i>	221

TABLE OF THE CASES REPORTED.

vii

	Page	V.	Page
Small <i>v.</i> Currie . . .	102		
Smith <i>v.</i> Pococke . . .	197	Vaughan <i>v.</i> Vanderstegen .	165,
Smith, Ramsden <i>v.</i> . . .	298		289, 363, 408
T.		W.	
Tayloe, Winterbottom <i>v.</i> .	279	Waugh <i>v.</i> Wyche . . .	318
Taylor <i>v.</i> Gilbertson . .	391	Way <i>v.</i> East . . . .	44
Taylor <i>v.</i> Richardson . .	16	Wiles <i>v.</i> Gresham . . .	258
Thomas, Hardingham <i>v.</i> .	353	Winterbottom <i>v.</i> Tayloe .	279
Thompson <i>v.</i> Judge . . .	414	Wright <i>v.</i> Vernon . . .	439
Tracey <i>v.</i> Lawrence . . .	403	Wyche, Waugh <i>v.</i> . . .	318
Tyrrell <i>v.</i> Clark . . . .	86	Wynch <i>v.</i> Grant . . . .	312



# CASES IN CHANCERY,

BEFORE THE

## VICE-CHANCELLOR

SIR R. T. KINDERSLEY.

SARAH PROCTER, MARY ANN PROCTER and  
GEORGE EVANS THOMAS v. JOHN COOPER  
and HENRY THOMAS WORLEY.

1853:  
8th November.

*Priorities.  
Judgment.  
Notice.*


THE bill was by the personal representatives of a judgment creditor against a purchaser, alleged to have notice, seeking to be paid in priority over him. It was admitted that the purchaser himself had notice, but it was alleged by him that he bought from one who had purchased without notice. The material facts were as follows:—

On the 2nd July, 1847, *Worley* borrowed a sum of 1500*l.* from *Procter*, on a promissory note, and secured it by a warrant of attorney to confess judgment, which was duly entered up on the 3rd July.

*Worley*, the debtor, had in 1842 become entitled to the equitable reversion of certain real estate; and in 1845, by

*A.*, on the occasion of advancing his client's money to *B.*, had search made for judgments by his clerks; it did not appear whether, in the result of their search, the clerks found any judgment against *B.*, or whether they communicated anything to *A.* But in fact the search was

made, and in fact there was a prior judgment entered up against *B.* *A.* afterwards took a mortgage of *B.*'s property, and then sold to *C.* Held, that the facts were sufficient evidence of notice of the judgment to *A.*, so as to affect *C.* the purchaser, and let in the judgment.

1853.  
  
**PROCTER**  
 and Others  
 v.  
**COOPER**  
 and Another.

the death of the tenant for life, he became entitled in possession to the equitable fee.

On the 7th of July, 1847, a Mr. *Kirby*, who was a certificated conveyancer, caused a judgment to be entered up against *Worley*, to secure a debt due from him to one *Porter Smith*.

On the 24th July, 1847, *Worley* gave a warrant of attorney to one *Beasley* to secure 2000*l.* to him, and judgment was entered up on the 31st July. This transaction was also negotiated by *Kirby*, both *Smith* and *Beasley* being his clients.

On the 30th October, 1847, *Worley*, by a deed to which *Smith*, *Beasley* and *Kirby* were parties, conveyed to *Kirby* the real estate above mentioned upon trust to secure the monies due from him to *Smith* and *Beagley*.

*Cooper* afterwards bought from *Kirby* the property comprised in the deed of October, 1847. It was admitted that, before this purchase, *Cooper* had himself notice of the judgment in favour of *Procter*. The question was, whether *Kirby* had notice of it before the date of the deed of October, 1847. On this point the evidence was as follows :—


*Kirby* was examined, and his depositions were, so far as they are material, as follows :

“ Mr. *F. Beasley* was a client of mine in June and July, 1847. I negotiated a loan of money from Mr. *Beasley* to Mr. *Worley* on the 24th of July, 1847. Mr. *Beasley* left the management entirely to me.”

In answer to a question, whether previously to the advance by *Beasley* he caused search to be made in the book of judgments in the Common Pleas for any judgment against *Worley*, his answer was, "I believe I made the search on the 9th July, 1847; but whether in contemplation of the loan by *Beasley*, I cannot remember. I caused the search to be made; I did not search myself. I have no recollection of the search having been made, but suppose it was, when I look at this paper (a paper put into the witness's hands), in which a charge of 2s. is made for searching. The paper is a petty disbursement paper. The entry in the 2nd page, 'searching for d<sup>o</sup> v. *Worley*,' means searching for judgments and annuities against Mr. *Worley*. The entry is under date 9th July. That means that the search was made on that day. I have no reason to doubt that the search was made. The entry is in the hand-writing of one of my clerks. The practice of my office was, when searches were made to communicate the result to me. I have no recollection whether the result of this search was communicated to me." Further he said, in reference to another loan by *Beasley* and *Smith* to *Worley*, "I believe I caused search to be made in the registry of the Common Pleas on the 24th July, 1847, because I find this entry made in the petty disbursement paper (this was an entry under date 24th July, 1847), 'searching for annuities and judgments, re *Worley*, 2s.'"

1853.  
PROCTER  
and Others  
v.  
COOPER  
and Another.

Two of *Kirby's* clerks, *Choat* and *Oxley*, were examined; they confirmed the statement, that it was the regular practice of *Kirby's* office to search for judgments; and one of them said it was his business to make the searches, and he had no doubt he had searched on the occasion of the loans by *Smith* and *Beasley*. He did not, however, state, nor did it otherwise appear,

1853.  
  
**PROCTER**  
 and Others  
 v.  
**COOPER**  
 and Another.

whether he had found the judgment of *Procter*, nor whether he had communicated the result of his search to *Kirby*.

*Lisle*, the purchaser's solicitor, was examined, and he proved that he had enquired of *Kirby* whether he had notice of *Procter's* judgment when he took the mortgage, and that *Kirby* said he had not; but *Lisle* did not ask *Kirby* whether he had searched. This was the material evidence.

Mr. *Baily* and Mr. *Cole* for the Plaintiff.

They relied on the evidence of *Kirby* and *Choat*, as showing that *Kirby* had in effect searched for judgments against *Worley*. If he had done so, that was enough to fix him with notice; and the purchaser claiming through him, must be postponed. They cited *Hodgson v. Dean (a)*.

Mr. *Bacon* and Mr. *Bevir* for the Defendant *Cooper*, the purchaser.


1st. As to the alleged notice to *Kirby*; his evidence is not sufficient to show notice before the deed of October, 1847. *Kirby* does not say he searched, nor is it proved in any other way that he did. He admits a charge for searching, and supposes therefore that search had been made: but that is mere inference, and the Court will not in a case of constructive notice admit any thing short of positive proof of the facts, from which notice is to be inferred. They referred to *Tolland v. Stainbridge (b)* and *Hine v. Dodd (c)*.

(a) 2 Sim. & Stu. 221.

(b) 3 Ves. 478.

(c) 2 Atk. 275.

2ndly. *Cooper* has done all that he could do, and all that he was bound to do. He caused his solicitor to enquire of *Kirby* whether he had notice, and *Kirby* said he had not. What could *Cooper* do more? He had no means of ascertaining whether *Cooper* had or had not notice, except by enquiring of him: *Jones v. Smith* (a). They cited also *Wallace v. Lord Donegal* (b) and *Wyatt v. Barwell* (c).

1853.  
  
*PROCTER*  
 and Others  
 v.  
*COOPER*  
 and Another.

The VICE-CHANCELLOR:

It is not contested that when *Cooper* purchased from the mortgagee, he had actual notice of the judgment of *Procter*. At the time of the completion of the transaction, the fact of there being that judgment was communicated to his solicitor; but then he was told that though he himself had notice, yet if *Kirby* had not notice when he took the mortgage in 1847, although he might since have had such notice, he *Cooper* might shelter himself under the absence of notice to *Kirby*, and might safely purchase the mortgaged property. In order to ascertain whether *Kirby* had notice or not, *Lisle*, *Cooper's* solicitor, asked him the question; *Kirby* answered that he had not. Now if it is proved that in fact *Kirby* had notice, his answering to *Lisle's* inquiries, that he had not, is of no value whatever. The question, therefore, is one of fact: had *Kirby*, or had he not, when he took the mortgage of October, 1847, notice of this judgment of *Procter's*? That is the whole question now. *Kirby* has been examined as a witness; and, besides *Kirby*, his clerks *Choat* and *Oxley* have been examined, and the result of the examination stated shortly is this: *Kirby* does not say he had not notice; on the contrary, what he says is

(a) 1 Hare, 43; 1 Phil. 251. (c) 19 Ves. 435.  
 (b) 1 Drury & Walsh, 461.



1853.  
PROCTER  
and Others  
v.  
COOPER  
and Another.

in substance, " I cannot state specifically, as a matter of recollection, what exactly was done as to searching for judgments, and what was communicated to me as the result of such search ; but I have no doubt that I caused search to be made." (The Vice-Chancellor referred to the passage in the evidence, p. 3.) *Kirby* says also, that it is his universal practice to make searches when he lends his client's money, and he refers to the entry in his disbursement book. (The Vice-Chancellor referred to the document stated in p. 3.) *Choat* says also, that it was *Kirby's* practice to have searches made ; that it was his business, and he has no doubt he did make them. I cannot doubt then, on the evidence of both *Kirby* and *Choat*, that search for judgments was made, not only on the 9th of July, but on several subsequent occasions. What communication of the result of his search *Choat* made to *Kirby*, does not appear ; but it is clear that search was made. Now, if search was actually made, that is sufficient, because the judgment was entered ; it matters not then that there is no distinct evidence what the clerk's report to *Kirby* was ; whether he reported that there was or that there was not a judgment ; there was one, in fact, and search was made. I am satisfied that upon this evidence, without adverting to the other circumstances (his Honor observed on the general aspect of the transaction as raising a strong probability of notice in *Kirby*), a jury would come to the conclusion that *Kirby* had actual and positive knowledge of *Procter's* judgment. And being of that opinion, I must make the declaration asked for by the bill.

FOOTNER v. COOPER.

**THIS** case came on upon a motion for a decree. *R. Cooper* made his will in 1816, in the following words:—"First, I give, devise and bequeath unto my dear and loving wife *Sarah Cooper*, all those my three cottage houses, or tenements, gardens, orchards, hereditaments, premises, with all the appurtenances thereunto belonging, together with all my household goods and chattels, monies, credits, property and effects of every sort and kind whatsoever and wheresoever, that I shall or may have power to dispose of at the time of my decease, to and for her use and benefit for and during her natural life; and after her decease, I give and bequeath all the aforesaid houses, tenements, gardens, orchards and appurtenances, with all monies, rights, credits, household furniture, and *all property whatever that shall be remaining after my wife's decease*, unto and equally between all my children, namely, *Thomas Cooper*, *William Cooper*, *James Cooper*, *Sarah* wife of *William Earney*, *Susanna* wife of *Thomas Newman*, *Betty Cooper*. And I will and bequeath that *Mary Cooper*, the widow of my late son *Robert*, may have one equal part or share between her and her children, the same as if my said son *Robert* was now living."

The testator died, leaving his wife and children and grandchildren living; the widow died in 1819. The Plaintiff was a purchaser from some of the children of the testator of what they considered their share of his real estate, and the sole question was whether under the will they took in fee or not.

1853:  
9th November.

*Will.*  
*Construction.*  
*Estate.*  
*What creates a fee.*  
*Words.*  
*Construction of word*  
*"property."*

A testator gave specific real estate and his personal estate, *property* and effects to his wife for life; and after her death he gave the aforesaid specific real estate, with all monies, rights, credits, &c., "and all property whatever that should be remaining after his wife's decease," to his children.

Held, that the children took his real estate in fee.

1853.  
  
 FOOTNER  
 v.  
 COOPER.

The state of the family was very complicated; the Defendants on the record were interested in contending that the will passed only estates in remainder for life, expectant on the decease of the testator's wife.

Mr. *E. F. Smith*, for the Plaintiff.

Mr. *Follett* for the Defendants on the record, objected that several parties interested were not before the Court. On this point Mr. *Smith* referred to the 50th & 51st sections of the Chancery Amendment Act, 15 & 16 Vict. c. 86. The cause was allowed to proceed.

Mr. *Smith*. The only question is, whether the will passed a fee after the death of the wife. He cited *Patton v. Randall*(a). There the word *property* was used without being allocated with personal estate; he cited also *Edwards v. Barnes*(b); *Doe v. Roberts*(c).

Mr. *Follett* for the Defendants on the record. In the 1st clause the word "property" is clearly used only to describe personal estate. The testator must not be intended to have used it in the second branch in a more extended sense. In *Patton v. Randall*, the question was whether the word property included at all the real estate.

Where words are used sufficient to pass real estate for life, there is no case to show that the word *property* will extend that to a fee. He cited on this point *Woollam v. Kenworthy*(d). There there was a gift of real estate sufficient to pass all the real estate he intended to pass. The word property thrown in afterwards, was

(a) 1 Jac. & W. 189.

(b) 2 Bing. 253.

(c) 11 Adol. & El. 1000.

(d) 9 Ves. 137.

held not to extend the gift of the real estates. That is the same case as this. *Doe v. Rout (a)*. Here there is first a gift of all that the testator had of real estate.

1853.  
FOOTNER  
v.  
COOPER.

The VICE-CHANCELLOR :

The question is, whether there is in this will a clear expression of intention to give all the testator's estate and interest. As to the language used in the gift to his wife for life, there may be doubt whether the words would have the effect of giving a fee in remainder. But when the testator first gives all his real and personal property to his wife for her life expressly, and then goes on to give the "aforesaid houses, &c.," and "all property whatever, &c., that shall be remaining after his wife's decease," the question is whether the word "property" is not sufficient to embrace not only any other real estate, but all the testator's interest in any other real estate, and all his interest in the particular lands before devised.

The word "property" is of extensive signification. It may mean personal estate; it may mean real estate; it may apply to either, or both, and it may include all the estate and interest in that which is given. In this case the words "all property whatever that shall be remaining, &c.," bear, I think, the interpretation of "all the *remainder of my property* after the determination of the wife's life estate." If that had been the actual language used, there could have been no doubt that the fee would pass, and that appears to me to be the legitimate construction of the words.

There are some collateral considerations which support

(a) 7 Taunt. 79.

1853.  
FOOTNER  
v.  
COOPER.

this view ; one is that when the testator means to give a life estate merely, he expresses it ; I do not, however, lay much stress upon that. Another consideration which is entitled to more weight is this ; in the direction as to the share of *Mary Cooper*, the testator says, she is to have “one equal part or share between her and her children, the same as if my said son *Robert* was now living.” Now if the testator had intended *Mary Cooper* and her children only to have life estates, this is to be observed : *Robert*, if he were living, could only have an estate for his own life ; but his widow and children are to have the same. Now they cannot have an estate for the life of *Robert*, who was dead ; it must be intended, therefore, if they are to be put in his place, and to have the same estate as if he were living, that must be an absolute estate.

However, I decide the case on the language of the gift in remainder, independently of the last argument, and am of opinion that a fee passes to the children.

CHARLES PRYCE v. FREDERICK BURY and  
ELIZA PRYCE.

1853:  
9th November.

*Construction.*

**BY** the settlement made on the marriage of *John Bury* and *Charlotte Pryce*, *John Bury* covenanted to surrender certain copyhold property to the use of himself for life; remainder to *Charlotte Pryce* for life; remainder to the use of the children of the said *J. Bury* by the said *C. Pryce* as *J. Bury* should appoint, and, in default, to the use of all such children as tenants in tail in common, with cross remainders. The premises were duly surrendered, and *J. Bury* admitted tenant for life.

*A.* and *B.* were tenants in tail in common of copyhold premises with cross remainders.

There was issue of the marriage two children and no more, *John W. Bury*, who died before the institution of the suit, and *F. Bury*, the Defendant.


*B.* borrowed for *A.* certain sums of money, for which the title deeds of the whole property were deposited with the lender, and *A.* signed a memorandum of deposit, undertaking to surrender his interest. *B.* signed at the foot the following memorandum,—“I join in the deposit.”

*J. Bury* died in 1822, without having exercised his power of appointment. *Charlotte Bury* died in 1823, and thereupon the two sons became tenants in tail in common in possession. In this state of things, *Frederick Bury* applied on behalf of his brother *J. W. Bury* to the plaintiff, for a loan of 500*L.*, and the Plaintiff acquiesced and lent the 500*L.*, taking the promissory note of *J. W. Bury*, and taking also a deposit of the title deeds of the property of which the brothers were tenants in tail in common. The deposit was accompanied by a memorandum in writing in the following terms:

*A.* died, leaving *B.* the remainderman in tail of his moiety.

“The above deeds and muniments are deposited with *Charles Pryce*, Esq., as collateral security for the pay-

Held, that the debt was a charge on the moiety which had been *A.*’s, but not on that of which *B.* was originally tenant in tail.

1853.  
  
 PRYCE  
 v.  
 BURY  
 and Another.

ment of the sum of five hundred pounds, for which I have this day given a promissory note to him, and I hereby engage to make a formal surrender of my interest in the estate to which the said deeds relate, by way of further security, whenever thereunto required. Dated 28th January, 1846. *John William Bury.*

“ I join in the deposit.

“ *Frederick Bury.*”

There was a further transaction of exactly the same kind on a further advance of 500*l.* by *Pryce* to *J. W. Bury.*

*J. W. Bury* duly paid the interest up to the 7th August, 1849, and he died on the 24th December, 1850, unmarried, and giving by his will all his real and personal estate to *F. Bury.* The principal debt and some interest being unpaid, *Pryce* filed his bill against *F. Bury*, and against a judgment creditor of the Defendant, to have the whole of the premises vested in *F. Bury*, as well his own as the moiety which had been his brother's, declared charged with the mortgage debt.

*Mr. W. W. Cooper*, for the Plaintiff.

The form of the memorandum shows that the deposit was intended to charge the whole. The words of the Defendant are, “ I join in the deposit. *F. Bury.*” Now the effect of the deposit of the deeds was to charge the estate comprised in the deeds. *F. Bury* therefore intended to charge his own moiety as surety for his brother.

*Mr. Glasse*, for the Defendant *F. Bury.*

No portion of the estate is charged. *J. W. Bury* was tenant in tail of a moiety, with remainder to his

brother. *F. Bury* does not join in the undertaking to surrender, but only in the deposit. The estate tail of *J. W. Bury* descends to *F. Bury* uncharged; for *J. W. Bury* not having barred his estate tail, *F. Bury* takes by the settlement what was *J. W. Bury's* estate, unfettered. If that is not the effect, at least *F. Bury's* moiety is untouched. He never meant to bar himself; all that he intended was to enable his brother to part with the deeds, which he could not do without *F. Bury's* consent.

1853.  
  
 PRYCE  
 v.  
 BURY  
 and Another.

Mr. *De Gex* with him.

A deposit of deeds will no doubt secure a debt due from the owner of the estate, but it will not of itself charge the estate of another person not the debtor. In this case, by the deposit, nothing was charged but the estate of *W. J. Bury* for life. But, at any rate, the form of the memorandum shows that *F. Bury* never meant to charge his own estate. The words used afford no presumption of intention to charge his estate, but merely an intention to ratify the effect of the deposit as to his brother.

Mr. *Fischer*, for the judgment creditor on *F. Bury's* estate, observed, that the memorandum was single; if *F. Bury* had intended to charge his estate, it would have been joint. As to the effect of a mere deposit, he cited *Chapman v. Chapman* (a).

Mr. *Cooper*, in reply.

It is said that *F. Bury* is not bound as to his estate in remainder; but when a party does an act, he is

(a) 13 Beav. 308.



1853.  
  
 PRYCE  
 v.  
 BURY  
 and Another.

estopped from disputing its effect. *F. Bury* has bound himself, on joining in the deposit, to do all that is requisite to make an effectual mortgage. The deposit was for the purpose of creating a security; that is what *F. Bury* joined in; that is, he joined in creating an equitable mortgage of the premises comprised in the deposited deeds.

THE VICE-CHANCELLOR:

The first question is, whether any part of the property, the subject of the claim, is liable to the mortgage. The second, whether, supposing one moiety liable, the moiety of which *F. Bury* is tenant in tail is liable, as well as *J. William Bury's* moiety.

As to the first question, it appears that the advance was made to *J. W. Bury* on the application of his brother *F. Bury*. The latter, on behalf of his brother, applied for a loan to him, which *Pryce* agreed to grant, and then the memorandum which has been referred to was made by *J. W. Bury*. Now, as to the effect of this, *J. W. Bury* was at that time tenant in tail of one moiety of the premises; he had in effect therefore absolute dominion over it, and might have been compelled to do all necessary acts to confer a good title to his moiety. The memorandum signed by *J. W. Bury* expresses the money to be borrowed by him; that it was his debt; that his moiety was to be the security. No doubt if *J. W. Bury*, being only tenant in tail, had died leaving issue without doing anything further, his issue would have taken, and his contract would have been inoperative to bind them. So, if he had died without issue, the remainderman would have taken free from *J. W. Bury's* charge. *J. W. Bury* had no issue, and his brother *F. Bury* was the remainderman. Being

so, he signs at the foot of the memorandum the note referred to—"I join in the deposit." What did he join for? Why to make the moiety of which his brother was tenant in tail with remainder to himself, a security for the 500*l.*; that was the purpose in view, and for that *F. Bury* joined. The language expresses on the face of it the purpose; that it was to secure the debt not on the whole property, but on *J. W. Bury's* moiety. And there is no ground for saying that *F. Bury's* joining in the deposit makes liable his own moiety, which was never intended to be a security. It appears to me, that the fair construction of the memorandum is this: the deposit was made to secure 500*l.* on the moiety of which *J. W. Bury* was tenant in tail and *F. Bury* tenant in remainder, and on that moiety only: there was no intention to make the other moiety a security. The declaration must therefore be, that the moiety of which *J. W. Bury* was tenant in tail is, as against *F. Bury*, liable as a security for the debt.

The decree embraced the whole 1000*l.* and interest; the transaction as to the second 500*l.* being precisely the same as that relating to the first sum of 500*l.*

1853.  
  
 PRYCE  
 v.  
 BURY  
 and Another.

1853.  
10 & 11 Nov.

TAYLOR v. RICHARDSON.

*Will.*  
*Construction.*  
*Blanks in Will.*  
A testator gave to his wife the income of his property in the funds, East India Stock or elsewhere, for her life. The principal of all such funds and stock and property he bequeathed and devised as follows :—He bequeathed "one-half of my [*here there was a blank*] son *Montague James*, to be under his own control, and the other moiety in trust for the children of my daughter *Fanny*." He made his son executor and residuary legatee. Held, that no construction could be put on the blanks, and the son, as residuary legatee, took the whole.

THE question in this cause arose on the will of *James Taylor*. The probate of the will was delivered out by the Ecclesiastical Court, with the omission of several words and figures which had been erased, so as to leave blanks.

The will as delivered out was as follows :—

"After payment of my funeral and testamentary expenses (for I know of no debts), it is my wish that the nurse of my dear *Ellen* should be presented with one [*blank*] pounds (£——) [*blank*], at the time of my decease, the sum of (£50) fifty pounds each. The nurse above alluded to was commonly called *Nana*. I leave to my only surviving sister, Mrs. *Elizabeth Aubin*, widow, the sum of (£1,000) one thousand pounds. For all the above purposes I reckon the [*blank*] will be more than ample; the balance to form part of my residuary estate. In order more fully to carry into effect my intentions, I hereby nominate and appoint my beloved wife, *Frances Maria* (formerly *Williams*) to be my executrix, jointly with my son *Montague James Taylor*, as executor. I leave and bequeath to my aforesaid beloved wife my house and furniture, plate, linen, wardrobe, wines, pictures, books and china, together with carriages, horses, and all her own personal paraphernalia of jewels, &c. to be at her sole disposal, as well as the balance of cash at my bankers Messrs. *Coutts & Co.*, besides the Exchange bills in their hands and accruing interest thereon. All these to be at [*blank*] and behoof. I also bequeath to my beloved wife aforesaid the whole income arising out

of my property in the funds, East India Stock or elsewhere that I now possess or may hereafter be entitled to, to be held at her disposal during the term of her natural life. The principal of all such funds and stock (including 188 shares in the American United States Bank, which cost £4,711 : 15s., on which dividends have stopped since 1839,) or other property, wherever the same may be, I bequeath and devise as follows:— I bequeath the one one-half of my [*blank*] son *Montague James*, to be under his own control, and the other moiety in trust, to be held subject to the education and settlement in life of the children of my daughter *Fanny Richardson*, with benefit of survivorship, to be apportioned equally, share and share alike, as they may arrive at the age of twenty-one years, or upon the marriage of the girls, at the discretion of my son *Montague James*, and I hereby appoint him the trustee accordingly, and to be my residuary legatee.”

1853.  
TAYLOR  
v.  
RICHARDSON.

The bill was filed by *Montague James Taylor*, the only son of the testator, and one of his executors, to have the direction of the Court. The Defendants were the testator's widow and the children of *Fanny Richardson*.

*Mr. Prendergast* for the Plaintiff.

The early blanks need not be considered, as the Plaintiff has done what he believed the testator wished. The question is, what is the effect to be given to the clause as to the moiety for the children of *Fanny Richardson*. There is after the words “ I give the one-half of my ” a gap, which can only be construed by the subsequent part; that subsequent passage does not explain the preceding blank. The will is therefore, as to that

1853.  
  
 TAYLOR  
 v.  
 RICHARDSON.

part, insensible. He cited *Hunt v. Hort* (a), *Miller v. Travers* (b), *Simmons v. Rudall* (c). The Court can only look at the probate; it cannot look at the original will: *Allen v. M'Pherson* (d). It cannot conjecture what did or might have filled the blanks, and there is nothing in the context to indicate what was the property of which the testator desired to give one moiety to his son, and the other moiety in trust for the children of *Fanny Richardson*. This portion of the will is therefore void for uncertainty, and the express residuary clause must take effect in favour of the Plaintiff.

Mr. *Nalder* for the widow.

Mr. *G. L. Russell* for the Defendants, the children of *Fanny Richardson*.

The Court will struggle against a construction which takes away everything from *F. Richardson's* children.

There is a gift of the whole property to the wife for life. The testator is dealing with the entirety. Then he gives the same principal, that is the whole; the will cannot therefore be read as one gift of the whole by this clause, and a separate gift of the residue by the final clause; but the whole must be read as one gift. The whole of the clause, after the gift to the wife for life, must be construed as one sentence; not as a gift of the whole and then of a residue, which cannot exist, if the first part is a gift of the whole. You must therefore transpose the latter part of the clause and read it thus, "The whole of my property I bequeath to my son, my

(a) 3 Br. C. C. 311.

(b) 8 Bingh. 244.

(c) 1 Sim. N. S. 115.

(d) 1 Phil. 133.

*residuary legatee*," not for his own benefit, but as a trustee. Then, so reading it, all that remains is to ascertain for whom is the trust; the answer to that is shown by the general intention,—the trust is for the children of *F. Richardson* as to one moiety, and for himself as to the other, these being throughout the objects of the testator's bounty.

1853.  
TAYLOR  
v.  
RICHARDSON.

But then it is said, I must assume the blanks to indicate an inchoate intention. But this is not like *Hunt v. Hort*, there the blanks must be filled up, otherwise there was no gift at all; but here you may construe the will without filling up the blanks. If the word "of" is read "to," in the bequest of the first half, that explains the whole; and the Court frequently alters words to give sense to a will.

The VICE-CHANCELLOR, without calling for a reply:

The testator made a will, which I am to regard as containing blanks. The Ecclesiastical Court says, the will is an instrument in such and such words, and in certain places, such and such blanks; it is, indeed, manifest that there are such blanks, because, in every case, if you read the will without the blanks, you make absolute nonsense. However, the Ecclesiastical Court has delivered out probate with blanks, and I am bound to look at them as part of the will.

Now the blanks may have arisen in two ways; it may be either that the testator originally left blanks, in which case he had not made up his mind what to put into them; or else the testator had put something into the spaces which are now blanks, and has since struck that matter out; and then it does not appear what he intended to substitute.

1853.  
TAYLOR  
v.  
RICHARDSON.

Now as to the particular blank which is in question. The testator first expresses his intention in a whole sentence; he bequeaths to his wife the whole income,—about that there is no doubt: then he goes on, “the principal of all such funds, &c. I bequeath and devise as follows,” so far still, there would be no doubt: then comes the sentence containing the blank. Now, if I could find in that sentence even a clear intention to give any thing to the son, there is at any rate no indication of what is given; there is a blank, which the testator might have filled up, but he has not. Can I supply that, and suppose he meant to give one-half of the property before described to his son for his own benefit, and the other half on trust? If I did, I should be making a will for him. Then it is ingeniously argued that the alteration of one word, the word “of,” into the word “to,” would make the whole sensible, and so it would, and no doubt this Court will sometimes alter words to carry into effect the clear intention of a testator. But here the testator has not so clearly expressed his intention as to render the alteration of the word inevitable; on the contrary, it is clear that he intended to bequeath one-half of something to his son, and he meant to describe, but has not described that something. If I altered the word “of,” I should be making the alteration to defeat and not to aid the clear intention, which was to leave at some time some portion of his property, so that one-half should go to his son, and the other half to the children of his daughter; but he has never completed that intention; he has not told us what the property is which he intended so to dispose of; the consequence is, that the residuary gift to the son takes effect, and nothing is taken out of it.

DEACON v. COLQUHOUN.

1853 :  
25 November.

**FRANCES DEACON**, by her will, dated the 15th of May, 1848, gave, devised and bequeathed all *her real and personal estate*, whatsoever and wheresoever, unto her affectionate sister *Katharine Colquhoun* wife of *James Colquhoun*, two of the Defendants, to hold the same unto her said sister, her heirs, executors, administrators and assigns, according to the nature thereof respectively, for her own absolute use and benefit; and she thereby appointed the said *Katharine Colquhoun* to be the executrix of her said will.

*Advancement.*  
*Gift inter vivos.*  
*A.* by her will gave all her estate to her sister; afterwards she transferred stock into their joint names, as it appeared, for the purpose of saving legacy duty. The will was void.

The execution of the will was attested by the Defendant *James Colquhoun* and another person as witnesses, who in the presence of each other attested the said will and subscribed their names thereto.

Held, that the transfer was intended to vest the beneficial estate by survivorship in the sister, and that she took the stock to the exclusion of *A.*'s next of kin.

The testatrix was at the date of her will possessed of personal estate, comprising among other things 1793*l.* 5*s.* 3*d.* three pounds five shillings per centum bank annuities standing in her name.

The bill alleged as follows :

“ Sometime after the said testatrix had made her said will, she became desirous of so dealing with the said sum of 1793*l.* 5*s.* 3*d.* three pounds five shillings per centum bank annuities, that after her death no probate or legacy duty should be paid or payable in respect thereof, and some time in the month of February, 1850, she wrote a letter to a Mr. *Helps*, her stock broker, to inquire whether she could put her little money in the stocks, meaning



1853.  
DEACON  
v.  
COLQUHOUN.

thereby the said sum of 1793*l.* 5*s.* 3*d.* three pounds five shillings per centum bank annuities, in the joint names of her sister and herself, and expressing her belief that such a course would save trouble and the expense of legacy duty. No answer was returned by the said Mr. *Helps* to the said inquiry contained in the said last-mentioned letter. On the 1st of March, 1850, a transfer of the said sum of 1793*l.* 5*s.* 3*d.* three pounds five shillings per centum bank annuities was effected in the books of the Governor and Company of the Bank of England, by the orders of the said testatrix, through the said Mr. *Helps*, from the name of the said testatrix into the joint names of the said testatrix and of the Defendant *Katharine Colquhoun*, and the same from thenceforth remained and was at the death of the said testatrix standing in the joint names of the said testatrix and the Defendant *Katharine Colquhoun*; and the testatrix from the time of the said transfer duly received the dividends on the said sum of 1793*l.* 5*s.* 3*d.* three pounds five shillings per centum bank annuities, amounting, less income tax, to the sum of 56*l.* 11*s.* 8*d.* per annum, to the time of her death."

This allegation was admitted to be substantially true.

The testatrix died on the 2nd of April, 1852, without having revoked or altered her will, and the Plaintiff and the Defendants *Katharine Colquhoun* and *Henry Colins Deacon*, her sister and brother, were her sole next of kin living at her death.

The will was alleged and admitted to be void under the recent Wills Act, the 7th of William the Fourth and the first of the Queen, intituled "An Act for the Amendment of the Laws with respect to Wills."

The question arising in the cause was, whether the transfer of the 1793*l. 5s. 3d.* three pounds five shillings per centum bank annuities before mentioned was or was not intended by the testatrix as a gift or for the advancement or upon trust for the Defendant *Katharine Colquhoun*, or whether it was made with the view and for the purpose only of saving probate and legacy duty.

1853.  
DEACON  
v.  
COLQUHOUN.

The Plaintiff contended that the testatrix died intestate as to the personal estate which at the time of her death she was possessed of, including the sum of stock, and that such personal estate, after payment of her funeral and testamentary expenses and debts, was divisible, in equal shares and proportions, between the Plaintiff and the Defendants *Katharine Colquhoun* and *Henry Colins Deacon*, as the next of kin of the testatrix living at her death.

On the 15th of June, 1852, the Defendants *Colquhoun* and his wife had transferred the stock into the names of other Defendants, *Welch* and *Julius*, as trustees of a certain deed of settlement.

*Colquhoun* and his wife and the trustees of the settlement insisted that upon the death of the testatrix, *Colquhoun* and his wife, in right of the wife, or the Defendant *Katharine Colquhoun* for her separate use, became absolutely entitled to the stock.

The Plaintiff insisted that the will being void, the transfer did not operate in favour of Mrs. *Colquhoun*, and that the testatrix had died intestate.

Mr. *Campbell* and Mr. *H. Clarke*, for the Plaintiff.

No benefit or advancement was here intended. This is not the case of parent and child, or of a person stand-

1853.  
  
 DEACON  
 v.  
 COLQUHOUN.

ing *in loco parentis*. Here the person who would be benefitted is the husband, in effect, a stranger. The only object of the testatrix was to save legacy duty. Now that, though not an unlawful object, is one that the Court will not be astute to carry into effect. That there was no other object is clear, because it is clear that the intention of the testatrix was that her sister should take by the will, and not as an advancement. They cited *Rider v. Kidder* (a); *George v. Howard* (b); *Benbow v. Townsend* (c), and *Farquharson v. Cave* (d).

Mr. *E. F. Smith*, for the Defendant *Henry C. Deacon*, one of the next of kin.

Mr. *Bacon* and Mr. *H. Stevens*, for the trustees.

Mr. *J. V. Prior*, for Mrs. *Colquhoun*, was not called upon.

THE VICE-CHANCELLOR:

I think it clear that Mrs. *Colquhoun* is entitled to the stock. The effect of the transaction of the transfer was, beyond doubt, to vest the *legal* interest in the two, Mrs. *Colquhoun* and her sister, as joint tenants. The next of kin, to support their claim, have to make out that there was a resulting trust in favour of the testatrix; that the stock was held in trust for her; and they have to establish that in the face of the testamentary declaration of the testatrix, that she did not mean to have a trust for herself, but did mean the property to go for the benefit of her sister. Consistent with that expression of intention is her letter to Mr. *Helps*, in which she tells him her object was to save legacy duty. Now, she could only save legacy duty on the footing of the transfer being a

(a) 10 Ves. 360.

(b) 7 Price, 646.

(c) 1 My. & K. 506.

(d) 2 Coll. C. C. 356.

gift to Mrs. *Colquhoun* by an act *inter vivos*; for if there was no such gift, and the stock had passed by the will, it must have paid legacy duty. Her object was so to dispose of her property that, on Mrs. *Colquhoun* surviving her, she should have the beneficial interest. I must decide therefore that the Plaintiff is not entitled.

1853.  
DEACON  
v.  
COLQUHOUN.

BOULCOTT v. BOULCOTT.

THIS was a special case for the opinion of the Court on the construction of the will and codicils of *Joseph Crew Boulcott*. The testator commenced by appointing his friends *Charles Cadman*, *Luke Hinde Cove* and *Robert Durant Buttemer*, husband of his niece *Mary*, to be executors and trustees of his will, and he bequeathed to *Luke Hinde Cove* the sum of 500*l.* sterling if he should act in the executorship and trusts of his will, but not otherwise. He gave several legacies, and then proceeded: "and I give, devise and bequeath all the messuages, farms, lands, tenements and real estate, whatsoever and wheresoever, be the same freehold, copyhold, leasehold or of any other tenure, of which I or any person or persons in trust for me, am, is, are or may be

1853 :  
November 23.

Will.  
Construction.  
Revocation.  
Legacy.  
Substitution.  
A testator gave to his eight nephews and nieces, naming them, provided that if any of them should die in his lifetime without leaving children; or, as to the nephews, should survive him and die under twenty-one, without

leaving children; or, as to the nieces, should survive him and die under twenty-one, without having been married, the share of each of them so dying, as well original as accruing, should go to the survivor and survivors, other and others. The testator revoked the trust created as regarded two of his nephews, *A.* and *B.* *A.* had attained twenty-one, survived the testator, and was living. *B.* attained twenty-one and died, living the testator. Held, that the limitations over of their shares were revoked, and that they went to the heir at law and next of kin.

Gift to an executor of 100*l.*; gift by a codicil of 500*l.* in substitution thereof,—then that gift revoked; the prior gift of the 100*l.* is not set up again.

1853.  
  
 BOULCOTT  
 v.  
 BOULCOTT.

seised, possessed or entitled at the time of my decease, and also all my goods, chattels, moneys, stocks, funds and securities for money and other personal estate and effects whatsoever and wheresoever, not hereinbefore specifically devised, bequeathed or disposed of, and not being trust or mortgage estates, unto and to the use of the said *Charles Cadman, Luke Hinde Cove* and the said *Robert Durrant Buttemer*, their heirs, executors, administrators and assigns, according to the several natures and tenures thereof, upon the trusts, and with, under and subject to the powers, provisoes, declarations and directions hereinafter expressed and declared of and concerning the same; that is to say, upon trust, in the first place, with and out of the same, to pay and satisfy all my just debts and funeral and testamentary expenses, and the several pecuniary legacies hereinbefore bequeathed, and after and subject thereto, *upon trust for my eight nephews and nieces, John Almon Boulcott, Joseph Boulcott, James Boulcott, Charles Boulcott, Mary the wife of the said Reverend Robert Durant Buttemer, Henrietta Boulcott, Margaret Boulcott and Anna Maria Boulcott, sons and daughters of my brother John Ellerker Boulcott, of Stratford House, in the county of Essex, Esquire, in equal shares, as tenants in common; as to the share of each of my said nephews, upon trust for him, his heirs, executors, administrators and assigns, and as to the share of each of my said nieces; upon trust* [here followed trusts for separate use, with powers to appoint, &c., on which no question arose]: provided also, and I further declare and direct, that if any one or more of them my said nephews and nieces shall happen to die in my lifetime without leaving any child or children of his, her or their body or bodies respectively living at the time of my decease, or any one or more of them my said nephews shall happen to survive me, and afterwards die under the age of twenty-one years without leaving

any child or children of his or their body or bodies respectively living at the time of his or their death or respective deaths, or any one or more of them my said nieces shall happen to survive me, and afterwards die under the age of twenty-one years, and without having been married, then the share or shares, as well original as accruing, of each one or more of them my said nephews and nieces so dying as last aforesaid, shall belong to and be held upon trust for the survivors and survivor and others and other of my said nephews and nieces, if more than one, in equal shares, for the same estates and interest, and with, under and subject to the same powers, provisoes, declarations and directions as I have hereinbefore declared of and concerning their, his and her original shares or share."

1853.  
BOULCOTT  
v.  
BOULCOTT.

The testator made a codicil, dated the 18th April, 1842, as follows: I hereby *revoke and make void the trusts created by* my said will as far as regards *my nephew John Almon Boulcott*, in all other respects I confirm my said will and the two codicils by me heretofore made. In witness whereof I have hereunto subscribed my name this 18th day of April, 1842. *Joseph Crew Boulcott*. And by another codicil in 1844 he gave to *Alexander Wylie* the sum of 100*l.* free of legacy duty.

By a further codicil in 1845 the testator revoked the appointment of *Charles Cadman* and *Robert Durant Buttemer* to be executors and trustees, and the devise and bequest therein made to them, their heirs, executors, administrators and assigns, upon trust as therein mentioned; and he nominated and appointed the said *Charles Cadman* and *Alexander Wylie* to be the executors and trustees of his will and any codicils thereto; and he gave, devised and bequeathed all the messuages, farms, lands, tene-

1853.  
BOULCOTT  
v.  
BOULCOTT.

ments and real estate, whatsoever and wheresoever, be the same freehold, copyhold, leasehold, or of any other tenure, of which he, or any person or persons in trust for him, was, were or might be seised, possessed or entitled at the time of his decease, and also all his goods, chattels, money, stocks, funds and securities for money and other personal estate and effects whatsoever and wheresoever, not in and by his said will specifically devised, bequeathed and disposed of, and not being trust or mortgage estates, unto and to the use of the said *Charles Cadman* and *Alexander Wylie*, their heirs, executors, administrators and assigns, according to the several natures and tenures thereof, upon the same trusts, and with, under and subject to the same powers, provisoes, declarations and directions as were in and by his said will and codicils expressed and declared of and concerning the same; and he gave and bequeathed unto the said *Alexander Wylie* the sum of 500*l.* sterling if he should act in the executorship and trusts of his said will, but not otherwise, free from legacy duty, but he declared and directed that such legacy should be in lieu and stead of the sum of 100*l.* sterling which he had given or bequeathed to him in and by the codicil of the 17th of January, 1844; and he thereby revoked and made void the trusts created by his said will, or any codicil thereto, as far as regarded his nephew *Joseph Boulcott*, and in all other respects he confirmed his said will and the codicils by him theretofore made.

By a further codicil in 1847, reciting that he had appointed *Charles Cadman* and *Alexander Wylie* to be executors and trustees of his said will and any codicils, and that he had bequeathed to *Alexander Wylie* the sum of 500*l.* sterling if he should act in the executorship and trusts of his said will, he revoked the appointment so made of the

said *Alexander Wylie*, as such executor and trustee as aforesaid, and the said bequest of 500*l.* sterling, and the devise, so far as respects the said *Alexander Wylie*, of his freehold, copyhold, leasehold and personal estates in the said codicil contained.

1853.  
Boulcott  
v.  
Boulcott.

The state of the family was this : *John Almon Boulcott* attained twenty-one and was living. *Joseph Boulcott* attained twenty-one and died during the testator's life, having been married but leaving no children. *Henrietta Boulcott* survived the testator, but died under twenty-one without having been married.

*Cadman*, the executor, proved the will, and afterwards died, and *Hillings*, one of the Defendants, was his personal representative, and also the personal representative of the testator. *Mary Boulcott* and *Mary Boulcott* the younger, the Plaintiffs, were the widow and representative of *Charles Cadman Boulcott*, one of the nephews of the testator, who died after the testator, and his infant daughter and heiress at law and sole next of kin.

*John Ellerker Boulcott*, the other Defendant, was the only brother and heir at law and sole next of kin of the testator.

The Plaintiffs *Mary Boulcott* and her daughter claimed in right of *Charles C. Boulcott*, between them, his original one-eighth share, and one-fifth of the three one-eighth shares originally intended for *John Almon Boulcott*, *Joseph Boulcott* and *Henrietta Boulcott*.

*Alexander Wylie*, another of the Defendants, claimed the legacy of 100*l.* mentioned in the testator's fourth codicil, and the other parties resisted the claim.



1853.  
  
 BOULCOTT  
 v.  
 BOULCOTT.

*John Ellerker Boulcott*, on the other hand, insisted that the Plaintiffs were only entitled to the original one-eighth share of *Charles C. Boulcott*, and that as to one-fifth of the three eighth shares, originally intended for *John Almon Boulcott*, *Joseph Boulcott* and *Henrietta Boulcott*, he, *J. E. Boulcott*, as the heir and next of kin of the testator, was entitled to it.

The questions submitted to the Court were:—

1. What share of the estate of the testator the Plaintiffs were entitled to respectively.

2. Whether *A. Wylie* was entitled to be paid the legacy of 100*l.*

*Mr. Shapter* (with whom was *Mr. Malins*) argued on behalf of the Plaintiff.

1st. As to the share originally intended for *Joseph*, the argument on the other side is, that when the testator revoked the gift as to him, he revoked also as to those to whom his share, if not revoked, would have gone over in the event which has happened. Now, it must be immaterial to the effect of the gifts over, whether *Joseph* was displaced by death according to the terms of the proviso, or by his share being revoked; the gifts over, to take effect on his death during the testator's lifetime, are intended to take effect just as much, that event having happened, if he is removed from the objects of the testator's bounty by revocation, as if he had not been so removed. The revocation is not of all the disposition of that one-eighth share, but of the trusts so far as regards *Joseph*.

It is well settled that the failure of partial bequests

does not operate as a destruction of the remainders over: *Sanford v. Sanford* (a) and *Hodgson v. Ambrose* (b). That was not, it is true, a case of revocation, but it must have been decided in the same way if it had been.

1853.  
Boulcott  
v.  
Boulcott.

He cited also *Carrick v. Errington* (c) and *Heming v. Archer* (d).

I rely also on this rule, that where there is a clear gift by a will, in order to deprive the donee, there must be at least as clear a destruction of the gift.

Here the gift is quite clear; if *Joseph* died in the testator's lifetime, leaving no children, the others were to take; and as he has so died, the gift to them in that event is clear; the revocation of that gift is not clear; it can only be arrived at by implication.

Next, as to *John's* share. There the donees over are to be regarded as a class, by reason of the gifts over being in effect cross remainders.

There is no instance of a share in remainder going to the heir at law by lapse or revocation, except where the gifts are to persons nominated, and not as a class, and there are no cross remainders.

Here the gift is to the nephews and nieces, that is, to them as a class. It is like a gift to executors; there, though given to them equally, yet, being a class, they take as joint tenants: *Knight v. Gould* (e). That case shows that where the gift is to a class, there, though they are named, no one can take till the class is exhausted.

(a) 1 De G. & Sm. 67.

(d) 8 Beav. 294.

(b) 1 Douglas, 337.

(e) 2 My. & K. 295.

(c) 2 P. Wms. 361.

1853.  
  
 BOULCOTT  
 v.  
 BOULCOTT.

He cited also *Shaw v. M'Mahon* (a) and *Harris v. Davis* (b), and referred to the judgment of the Vice-Chancellor in that case, p. 426, distinguishing the case from *Cresswell v. Cheslyn*.

These cases rule the present case. The testator contemplated a gift to a class; the share therefore intended for *John* cannot go to any one till the class is exhausted. On similar grounds the Plaintiffs claimed a portion of *Henrietta's* share.

As to the legacy claimed by *Wylie*, he contended that it was not revived, and *Wylie* took nothing.

Mr. *Russell* and Mr. *G. L. Russell*, for the heir at law and next of kin.

We claim the one-eighth intended for *John*, and the one-eighth given to *Joseph*. As to *Henrietta's* share, of that we claim two-sevenths.

1st. As to *John's* share, the codicil of 1842 revokes the gift to him. As to his share, it was an entire revocation. It is not correct to say it was a gift to a class; it was a gift to individuals by name, as tenants in common: *Knight v. Gould* was a gift to the executors thereafter named, and that was held a gift to the persons filling the office, and not to individuals. As to *Henrietta's* share, it is given over: "in case any of my said nephews and nieces, &c." (They referred to the will.) Now, the seven others survived *Henrietta*, therefore the share of *Henrietta's* share which *John* would have taken but for the revocation, comes to us.

(a) 4 Dru. & War. 431.

(b) 1 Col. 416.

Then as to *Joseph's* one-eighth. When *Henrietta* died, she left *Joseph* surviving her. Then comes the codicil of 1843.

1853.  
Boulcott  
v.  
Boulcott.

Now, the trusts were—one-eighth original share for *Joseph* and one-seventh of *Henrietta's* one-eighth for him; but all that is revoked. Where is there any gift to anybody else? If there is none, it all goes as undisposed of.

Mr. *Campbell*, for *A. Wylie*, argued that the legacy of 100*l.* was revived.

Mr. *Sumner*, for the executors.

Mr. *Shapter*, in reply.

The VICE-CHANCELLOR :

As to the legacy of 100*l.* to *Alexander Wylie*, I feel no doubt. First, a legacy of 100*l.* is given to him without qualification by the codicil of the 17th January, 1844; then, by the codicil of the 19th December, 1845, the testator appoints him one of the executors and trustees of his will, and gives him 500*l.* expressly in lieu of the 100*l.*: he introduces the usual direction, as a condition of his being entitled to the legacy, that he shall act in the executorship. If the matter stood there, Mr. *Wylie* would clearly be entitled to his 500*l.* But supposing he had resigned the executorship, could he have taken the 100*l.*? I think not. The gift of the 100*l.*, though not in terms, is in fact revoked. The testator, by the codicil of the 15th February, 1847, revokes all that *Wylie*, his executor, could be entitled to; and I am of opinion that he cannot set up the 100*l.* legacy as revived.

1853.  
 BOULCOTT  
 v.  
 BOULCOTT.

The next question is, who is entitled to the share intended for *John Almon Boulcott*. The testator by his will gave his real and personal estate to trustees; in trust, in the first place, to pay his debts and funeral and testamentary expenses, &c., and certain legacies; and, subject to those, upon certain trusts (The Vice-Chancellor referred to the bequest in favor of the testator's nephews and nieces, p. 26).

Now, this is a gift to the nephews and nieces, not as a class, but as individuals. In one sense they are a class, that is, as the testator's nephews and nieces; as persons to whom he gives particular shares of his property; but the gift is to them as individuals, nephews and nieces nominatim, and expressly as tenants in common. If upon the language of this will I were to hold them not to be tenants in common, I should be overturning the settled law upon this subject; for what the testator says is in effect this: I give to *John* one-eighth, to *Joseph* one-eighth, &c. Then he directs the shares of the nephews to go to them absolutely, and the shares of the nieces to be subject to powers of appointment, &c., and then comes the proviso.

Now, there was an absolute gift of one-eighth, in the events which have happened, to *John*, and then comes the codicil in which the testator revokes his gift as to *John*. If there had been no revocation, *John* would clearly be entitled. I think, therefore, that as to that share, the heir at law and next of kin must take.

As to *Joseph's* share, the case is not quite so clear. To *Joseph* there is a gift of one-eighth absolutely, subject to this, that if he dies in the testator's lifetime, leaving a child or children, they are to take. But then it is pro-

vided that if he dies without leaving child or children, the event which has happened, then the share which he would have taken is to go to the survivors or others; so that if there had been no revocation, *Joseph*, in the events which have happened, having died without issue, his one-eighth would have gone over to the other seven. But then comes the revocation. The question suggested is, whether the gifts over are to be dealt with with reference to the revocation only, or with reference to *Joseph* having died without leaving children. But, as *Joseph* was living when the testator revoked the gift, the testator must have had in his contemplation that he had given to *Joseph* a one-eighth share, with limitations over in one event to his children; in another to the other nephews and nieces. He means, I think, nothing of this to take effect. He revokes it altogether, not merely as to *Joseph's* individual interest, but as to the limitations of his share, which were to take effect in certain events. I am of opinion that the revocation is absolute as to the whole of that share, and that it goes to the heir at law and next of kin.

1853.  
  
 BOULCOTT  
 v.  
 BOULCOTT.

As to *Henrietta's* share, his Honor held, that as, if she had survived the testator, she would have been entitled to one-eighth, and as her one-eighth went over to the other seven, one-seventh of her one-eighth would have gone to *John* and one-seventh of the one-eighth to *Joseph*; and that as the testator's directions applied equally to the accruing and to the original shares, the former were revoked as well as the latter, and passed to the heir at law and next of kin.

1853:  
November 11.

FITZHENRY v. BONNER.

*Will.*  
*Construction.*  
*Implication.*  
*Estate implied.*  
A testator gave his residue to his wife for her and her son's support, clothing and education, until he should attain twenty-one. If he died under twenty-one, then he gave all the interest of his Bank Stock to his wife for life; after her death, he gave all his property to his daughter. Held, that the son did not take any estate by implication on attaining twenty-one; but there was an intestacy.

THIS case came on upon a petition, on the construction of the will of *R. J. C. Herries*, by which the testator, after directing the payment of his debts, &c., gave all his personal estate and effects to trustees upon trust as followed. The will then proceeded:—

“ I give and bequeath all the yearly interest arising from my said property to my wife *Mary Herries*, for her and my son's, *Robert Charles Herries*, support, clothing and education, until my aforesaid son shall arrive at the lawful age of twenty-one years. Should my son die before he arrives at the age of twenty-one years, I will and bequeath the whole interest of my Bank Stock to my wife *Mary Herries* for life. At the death of my wife *Mary*, I will and bequeath the whole of my property, of whatever kind, to my reputed daughter *Mrs. William Scott*, to be settled on her by my aforesaid executors, independent of her present husband or any future husband she may have during her lifetime.”

Mr. *Karslake*, (with him Mr. *Bacon*,) for the petitioner.

The question is, whether the son, who attained twenty-one and died, took an estate by implication on attaining twenty-one. To show that such an implication arose, he referred to *Goodright v. Hoskins* (a), *Newland v. Shepherd* (b), *Peat v. Powell* (c), *Harman v. Dickenson* (d), *Langston v. Langston* (e).

(a) 9 East, 306.

(b) 2 P. Will. 194.

(c) Amb. 382.

(d) 1 Br. C. C. 91.

(e) 8 Bl. H. L. C. 167.

Mr. *Glasse* and Mr. *Eddis*, for Mrs. *Scott*, cited *Davis v. Davis* (a) and *Cooper v. Pitcher* (b).

1859.  
FITZHENRY  
v.  
BONNER.

Mr. *Campbell*, for *Mary Richardson*, the widow of Colonel *Herries*, the testator.

1st. The widow is entitled to the whole interest, subject only to the duty of maintaining her son. The words "until my son, &c." only put a limit on the duty laid on the wife; they do not limit her interest to a life estate.

2ndly. If that is not the construction, then there is an intestacy, from the period of the son attaining twenty-one, and the widow will be entitled to her one-third. He cited *Hamly v. Gilbert* (c).

Mr. *E. F. Smith* with him.

Three constructions may be contended for. 1st. That the widow took an absolute interest, subject to the duty of maintaining her son. 2ndly. That she took a life interest, subject to the same charge. 3rdly. That there was an intestacy on the son attaining twenty-one.

The yearly interest is given to the wife: that is sufficient to carry the absolute interest. *Bowden v. Laing* (d).

At any rate the interest thus given cannot be less than a life estate.

Mr. *Follett* and Mr. *H. Stevens*, for incumbrancers of the widow.

Mr. *Karslake* replied.

(a) 1 Russ. & M. 645.  
(b) 4 Hare, 485.

(c) Jac. 354.  
(d) 14 Sim. 113.



1853.

FITZHENRY  
v.  
BONNER.

## The VICE-CHANCELLOR :

The testator, who was a military man, made his own will. He made a disposition of the income of his property, during the infancy of his son ; he made a disposition of his property, in the event of his son dying under twenty-one ; but he made no disposition in express terms of his property, in the event which happened, of his son attaining twenty-one. And the question is, that event having happened, how the property is to be disposed of.

The bulk appears to consist of Bank Stock. Now various constructions have been suggested ; one, on behalf of the widow and her incumbrancers, is, that the disposition of the income, until the son attains twenty-one, gives to the widow an absolute interest in the whole, subject only to be defeated in the event of the son dying under twenty-one.

The second construction suggested on behalf of the widow is, that if the gift to her is not of an absolute interest, it is at any rate a gift of a life estate, subject only to the obligation of maintaining her son until he shall have attained twenty-one.


Now, neither of these constructions appear to me to be well founded. The gift of all the interest, &c., has, I think, the effect of giving to the wife and son an interest only until the son attains twenty-one ; some argument was raised on the meaning of the word " her " in the clause expressing the gift to be " for her and my son's support, &c." One construction contended for was, that it meant " for her, for my son's support." Another, that it means " for her support and for my son Robert's support." And another, that the language used was in-

tended to designate the testator's son, as "her and my son," as distinguished from children which were his but not her's. It is not very material to decide this question; however, my impression is, that the testator used the language adopted by him in this sense,—“for the support of her, and for the support, &c., of my son Robert,” but intending that it was to be paid to the mother to be applied for the benefit of herself, as well as of her son.

1853.  
FITZHENRY  
v.  
BONNER.

It is to be observed, that the testator does not give the whole of his property to his wife as a trustee. He first gives it to other persons as trustees, who are to pay the income to the widow during her son's minority. The trustees are not to hold it for the son; but to pay it to the widow, for the support of herself and the son. Now, was it intended that the wife should take an absolute interest, or even an interest for her life, charged only with the obligation of providing for the maintenance of the son? If either of these was the testator's intention, it would have been perfectly useless for him to provide, as he has done, that in the event of the son dying under twenty-one, the widow should have an absolute interest in *part* of his property; this would have been wholly unnecessary, if she was to have an absolute interest, or even a life interest, in the whole; and I think he has thus himself shown that he did not understand that he had given his wife, either an absolute interest, or an interest for life. I am of opinion that the gift of the income to the wife, for the support, &c., has the effect only of giving to her, for the benefit of herself and the son, an interest until the son should attain twenty-one, or die under twenty-one.

The next question is this: the testator having thus provided for his widow and his son, till he should attain

1853.  
  
 FITZHENRY  
 v.  
 BONNER.

twenty-one, and having provided what is to take place, if his son should die under twenty-one, has not in express terms made any provision for the event of his living to attain twenty-one. Now, can I imply a gift to the son, in the event of his attaining twenty-one, of the whole of the property? No doubt there are many cases where the Court will, in the absence of express gift, raise a gift by implication; but it will not do so unless the implication is necessary, irresistible; that is, where, looking at the language, at all the dispositions of the will, and the circumstances, there is an irresistible inference in favor of implying a gift. But do I find here any such irresistible inference? What are the previous dispositions? Until the son attains twenty-one, they are in favor of the widow and the son; if he dies under twenty-one, they are in favor of his widow. What is there to lead to an irresistible inference, that if the son should attain twenty-one he is to be benefited, exclusively of the testator's widow? Then, as to the circumstances, there is not even a *probability* that a man leaving a widow and a son should intend to provide for the son exclusively, leaving the mother at the mercy of the son, who may or may not fulfil the moral obligation cast upon him; still less is there any thing in the circumstances in this case to lead to an irresistible inference of any such intention.

If I were to conjecture, I should conjecture, perhaps, that the testator did intend to provide for his son, leaving him fettered only by the moral obligation to provide for his mother; but that would be only conjecture, in which I am not at liberty to indulge.

I am of opinion, on the whole, that there is no implied gift to the son on his attaining twenty-one; and the effect of my decision will be, that in the events which

have happened, there is an intestacy, and the widow will of course take one-third, and the son the other two-thirds.

1853.  
FITZHENRY  
v.  
BONNER.

PRYCE v. BURY.

THIS cause (reported, *ante*, pp. 11—15) came on to be spoken to on the minutes.

The question now was, whether, on surrendering, the fines and other expenses payable on the admittance of the Defendant, and on the surrender, were to be paid by the mortgagor or by the mortgagee.

Mr. Glasse and Mr. De Gex, for *F. Bury*, referred to the judgment. *F. Bury* is not bound to pay the fines, &c. There is no authority on the subject. *Hill v. Price* (a) is the only case touching upon it; but it decides nothing, for there was an express covenant to surrender at the expense of the Defendant. This case is reported in *Dickens*, and in *Seton on Decrees*. (Mr. De Gex stated that he had examined the registrar's book, and found that the case was correctly stated in *Seton*, and incorrectly in *Dickens*.)

In this case, *J. W. Bury* expressly agreed to surrender, but *F. Bury* did not. There is therefore no legal obligation on him to surrender at his own expense. *Ball v. Harris* (b) shows the practice. There the decree is merely for the mortgagor to convey, without saying at his cost.

(a) 1 Dick. 344; *Seton* on (b) 8 Sim. 485.  
Decrees, 154.

1853:  
December 3rd.

Equitable mortgage.  
Copyhold.  
Mortgagor and Mortgagee.

On foreclosure of an equitable mortgage of copyhold, the mortgagor being the person to take the necessary steps for an effectual surrender, must pay the expense of all such steps.

1853.

PRYCE

v.

BURY.

But even if, in the ordinary case, the mortgagor ought to pay the costs, this is not the ordinary case; it is a case, not of principal mortgagor, but of a person merely liable as a surety. The liability is not greater than is actually expressed. The Defendant is really in fact a trustee, and ought to have his expenses.

Mr. *W. W. Cooper*, for the Plaintiff.

The common foreclosure decree does not express that the mortgagor is to pay the costs of conveyance, because it is too well settled that he ought to do so. An equitable mortgagor is bound to do everything to complete the title of the mortgagee; it is not necessary that he should contract to do it; he contracts impliedly. The covenant therefore in *Hill v. Price* was perfectly unnecessary, and that case is an authority for me. (He referred also to *Parker v. Housefield* (a), and to the decision in *Newton v. Aldous* mentioned in that report.)

Mr. *Glasse* replied.

The VICE-CHANCELLOR:

The question in this case is, who is to pay the expense attending the surrender. In the absence of authority, (*Hill v. Price* is no authority either way, on account of the express covenant,) I must endeavour to decide on principle.

The common rule of this Court as to an equitable mortgage by deposit, is this: by the deposit, the mortgagor contracts that his interest shall be liable to the debt, and that he will make such conveyance or assurance as may be necessary to vest his interest in the mortgagee.

(a) 2 Myl. & K. 419.

He does not contract that he will make a perfect title, but he does bind himself to do all that is necessary to have the effect of vesting in the mortgagee such interest as he, the mortgagor, has. (The Vice-Chancellor referred to the terms of his judgment on the merits of the case, ante, p. 14, and proceeded.) Now, if the case were one of an equitable mortgage of freehold, the decree would be that the mortgagor should convey to the mortgagee, without saying at whose expense. In carrying this out, the course would be, that the mortgagee would have to prepare a draft and submit it to the mortgagor. When the draft was settled, the mortgagee would have to engross and stamp it, and tender it for execution to the mortgagor, and on that tender being made and refused, and not before, the mortgagor would be guilty of breach of the terms of the decree.

1853.

PRYCE  
v.  
BURY.

But in the case of an equitable mortgage of copyhold, the course of transmission of interest is different. The person to take the initiative is not the mortgagee, but the mortgagor. He is the person to prepare and make the conveyance. He must surrender; he is bound by the decree to make the surrender; and whatever is necessary to enable him to make that surrender, he is bound to do. And that being so, I think he has no right to say that, for the steps which he is bound to take under the decree, other parties are to pay. It is the mortgagor's duty to make the transfer, and he must pay for the expense of effecting it.



1853 :

November and  
December.Argued on the  
3rd, 4th and  
7th November.

WAY v. EAST.

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*Mortmain.*

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A deed of gift to trustees of a rent-charge for charitable purposes duly enrolled, and otherwise legal on the face of it. The grantor lived many years afterwards and kept the deed, and the terms of the deed were never enforced.

There was evidence of conduct to show intention in the grantor and one of the trustees, that the deed was not to take effect till after the grantor's death; but no evidence of any specific agreement.

Held, upon the evidence, that the deed was invalid.

THE object of this suit was to set aside a deed of the 26th January, 1839, by which a rent-charge of 95*l.* was made to certain uses, alleged to be charitable uses within the Mortmain Act. The deed in question was made between *Thomas Gwennap*, since deceased, of the first part; *Jabez Burns*, one of the Defendants, and *R. T. Makins* of the second part, and *T. King* and *T. Eccles* of the third part; and by it a rent-charge of 95*l.* charged upon certain leasehold property of *Thomas Gwennap* was granted by him to *Jabez Burns* and *R. T. Makins* for a term of ninety-nine years, with powers of distress and entry; and for securing the rent-charge, the premises were demised to *King* and *Eccles* for the remainder of the terms for which the different portions thereof were held, upon trust, out of the rents and profits, or by mortgage or sale, &c., to secure the due payment of the rent-charge. And it was declared that the annuity was granted upon trust, from time to time "to pay, distribute and apply the same in manner following (that was to say):—As to the yearly sum of 40*l.*, part of the yearly rent of 95*l.*, to pay the same to the treasurer for the time being of Enon Chapel in, &c. (of which chapel *Jabez Burns* was at the time of the execution of the indenture the minister), and to be applied by him in the manner following (that is to say):—In case the salary of the minister for the time being of the said chapel should not exceed 150*l.* a year, then to the said minister for the time being; but in case his said salary should exceed 150*l.* a year,

then in or towards the liquidation of the debt of the said chapel; and when and after the said debt should have been discharged, then the said yearly sum of 40*l.* to be applied by the said treasurer in or towards enlarging the said chapel, should that be found practicable or thought necessary, or otherwise for the general support of the cause in that chapel, as the said *Jabez Burns* and the said *R. T. Makins*, or the survivors, &c., or other the trustee or trustees for the time being, should in his or their discretion think desirable." Then there were directions as to 30*l.*, to apply it for the relief of the sick and poor of Enon Chapel; as to 5*l.*, to pay the same to the treasurer of the sunday-school; as to 10*l.*, to pay the same to the treasurer of the General Baptist New Connexion Home Mission of the London Conference; and as to the remaining 10*l.*, to dispose thereof in food and clothing among the poor of Enon Chapel. The deed was enrolled in the Office of Land Revenue Records and Enrolments, and a docquet entered in the docquet book of the Office of the Woods and Forests. It was also duly enrolled in Chancery.

1853.  
  
 WAY  
 v.  
 EAST.

*George East*, the first Defendant on the record, was duly appointed trustee in the place of *Makins*.

*Thomas Gwennap* made his will, dated the 10th July, 1849, and by it he appointed *Jabez Burns* and *J. Chapman* executors and trustees thereof; and he devised and bequeathed to them, *inter alia*, the leasehold premises comprised in the deed of 1839, subject to the rent-charge of 95*l.*, upon various trusts for the benefit of his family and connexions.

*Thomas Gwennap* died in 1850, and *Burns* alone proved his will.



1853.

WAY

v.

EAST.

In 1851, a suit was instituted for the administration of *Thomas Gwennap's* estate. The bill suggested that, at the time of the execution of the deed of 1839, it was understood and agreed between him and *Burns*, and all other parties claiming under that deed, that no part of the rent-charge should be paid by the testator during his life, and that he became doubtful of the validity of the rent-charge under the circumstances; and that in order to secure the validity thereof, he drew a cheque on his bankers, dated the 14th June, 1850, but which was post dated and void, as follows:—"Pay to the Rev. *Jabez Burns* or bearer, 1,045*l.*, the amount of grant by deed for sundry charities connected with Enon Chapel, New Church Street, Marylebone, in discharge of all claims up to 26th January, 1850." The bill then alleged that the cheque was delivered to *Burns* on an understanding that it should be returned; that it was returned by *Burns* with the consent of the elders of the chapel; that the testator kept it up to the time of his death, and that when he drew it he had not as much at his bankers.

By the decree made in that suit, it was, among other things, referred to the master to state whether any and what proceedings, and by whom, should be taken to set aside the grant of the rent-charge.

After the decree, one of the defendants in searching among the papers of the testator, found a memorandum dated 29th December, 1847, in the following words:—"Whereas we the undersigned, being the legally appointed trustees and executors of certain bequests and annuities, left by Mr. *Thomas Gwennap* to Enon Chapel, and benevolent institutions connected therewith, do declare and affirm that we are fully aware that Mr. *Thomas Gwennap* bequeathed the said annuities by bond or gift

in June, 1839, to meet the legal difficulties arising from the law of Mortmain, but designing that the said annuities should not be paid till after his decease, and, furthermore, in lieu of them he has during his life contributed to the aforesaid charities liberally, therefore we do hereby declare that we could not in justice demand any of the annuities until it shall please Divine Providence to remove by death Mr. *Thomas Gwennap*; and in proof of our purpose and intention, and for the satisfaction of Mr. *Gwennap* and his heirs, we do attach our names to this document, which we wish to be our entire discharge of all claims on said bond up to this date, and also engage to renew the same discharge every half year, during the life of Mr. *Thomas Gwennap*, dated this 29th December, 1847. *Jabez Burns, George East.*"

1853.  
W<sup>AY</sup>  
v.  
E<sup>AST</sup>.

The Master, by his separate report, in the cause of "*Gwennap v. Burns*," found that no part of the rent-charge of 95*l.* was ever paid by the testator, or attempted to be enforced out of the rents and profits of the leasehold premises comprised in the deed, during the testator's lifetime, nor was any demand made during his lifetime for such payment; except that on the 13th June, 1850, the testator gave *Burns* a cheque on his bankers for 1,045*l.* (as the amount of grant by deed for sundry charities connected with Enon Chapel, in discharge of all claims up to January, 1846), but that the cheque was never presented; that the testator had not, when he drew the cheque, more than 175*l.* at his bankers, and that the cheque was immediately, with the consent of a general church meeting of the congregation, returned by *Burns* to the testator.

It appeared that the deed of January, 1839, remained in the hands of the testator, with very trifling exceptions,

1853.

WAY

v.

EAST.

till his death, and he applied the rents of the premises to his own use.

This suit was instituted in pursuance of the direction of the Court, and its object was to set aside the deed of the 26th January, 1839.

The bill prayed, first, that it might be declared that the grant expressed to be made by the deed, was void and of no effect.

2nd. That the deed might be declared void and ordered to be delivered up to be cancelled.

3rd. That *Burns*, the trustee and executor of *Thomas Gwennap's* will, might be decreed to hold the premises comprised in the deed in trust for the persons interested under the testator's will, and as his next of kin, according to such interests as they would have had if the rent-charge had never been granted.

The Attorney-General was made a Defendant.

Evidence was gone into, to show the existence of a secret agreement between the testator and the trustees of the deed.

*James Wyatt*, one of the attesting witnesses to the deed, said, that when the deed was executed, *King*, one of the parties to it, said to *Gwennap*, "that as the deed was all ready, the sooner it was executed the better, because he must live some time after the deed was executed for it to take effect in possession, and that the rent-charge should not be paid till his death." Another witness, however, contradicted on this point the whole

statement of the witness *Wyatt*. Both concurred in a statement that Mr. *Gwennap* had been in the habit of contributing from the date of the deed down to his death to the chapel charities, to the amount of about 95*l.* per annum; also that Mr. *Gwennap* was in immediate expectation of death when he executed the deed. And one of the trustees of the deed being examined said, "If Mr. *Gwennap* had not supported the charities as he did, I should have thought it my duty to enforce the deed."

1853.

W<sup>A</sup>Y  
v.  
E<sup>A</sup>ST.

One of the daughters of *Gwennap* proved, that when Dr. *Burns* used to apply to her father for charitable contributions connected with the chapel, *Gwennap* used to say, "Well, *Burns*, I can't give you much now, but at my death you will have sufficient for all you want out of my bond." That he always called the deed in question a bond. This conversation took place *after* the execution of the deed.

The same witness swore distinctly, that on the night when the deed was executed, she was present, and she heard her father say to *Burns*, that the 95*l.* per annum was not to be paid till his death. On cross-examination she repeated that she had many times heard her father say that the money would not be payable to the charities till after his death. The remainder of the material evidence is referred to in the judgment.

The cause now came on to be heard.

Mr. *Swanston* and Mr. *W. D. Lewis*, for the Plaintiffs.

They argued that the deed of January, 1839, was not made to take effect immediately on its execution, and was therefore within the 9 Geo. 2, the Mortmain Act. They

1853.

WAY

v.

EAST.

cited *Collins v. Blantern* (a); *Paxton v. Popham* (b);  
*Armstrong v. Armstrong* (c).

The deed and the parol declaration of December, 1847, must be taken together to see what was the real intention of the parties in the transaction: *Doe v. Hawthorn* (d); *Limbrey v. Gurr* (e). If it be said that the Statute of Frauds prevents the Court from looking at the parol declaration, the answer is, the Statute of Frauds is not to be used to assist a fraud upon the law: *Muckleston v. Brown* (f); *Stickland v. Aldridge* (g).

They then referred to the evidence, and argued that the whole of it showed that the deed and the arrangement referred to in the memorandum of December, 1847, were cotemporaneous. The retention of the deed by the donor, the abstinence of the trustees from enforcing the payment or any of the terms of the deed, the concealment of the deed from the congregation of the chapel, all tended to the same conclusion.

The memorandum of 1847 clearly contemplates an illegal agreement; the deed itself, it is true, standing alone, would be legal; but it is controlled by the memorandum; the two must be taken together, and make the agreement; and Equity will not assist that which is only a part of the agreement, viz. the deed, to the exclusion of the effect of the other part of the agreement. Every thing showed that both *Gwennap* and *Burns* contemplated a future and not an immediate charity, and that is illegal. It will be argued that the testator did mean an

(a) 2 Wils. 347.

(b) 9 East, 408.

(c) 3 Myl. &amp; K. 45.

(d) 2 Barn. &amp; Ald. 96.

(e) 6 Mad. 151.

(f) 6 Ves. 52.

(g) 9 Ves. 516.

immediate charity, because he was in the contemplation of immediate death. But that argument is against the deed, for it shows that death, and not any fixed event or period, was the event on which the deed was to take effect. The transaction of the cheque showed also that the whole transaction was a juggle.

1853.

W AY  
v.  
EAST.

Mr. *Craig* and Mr. *Buxton*, for *Samuel Gwennap*, a Defendant in the same interest as the Plaintiff.

The conduct of the parties will be looked at on the question of setting aside a deed for fraud ; for that is not a question of the construction of the deed, but of its specific validity. Now in this case there is a complete tissue of fraudulent incidents. They commented on the evidence, following the same line of argument as the Plaintiff. *Attorney-General v. Poulden (a)* was also cited.

Mr. *W. W. Cooper*, for *Sarah Gwennap*, in the same interest.

Mr. *H. Clarke* appeared for *Samuel Stimpson*, one of the trustees of the chapel, who claimed no interest, and asked to be dismissed.

Mr. *Campbell* and Mr. *Greene*, for *Bishop* and wife, members of the family, contended also against the validity of the deed.

Mr. *S. Smith*, for other parties in the same interest.

Mr. *Glasse* and Mr. *Bagshawe*, jun., for the Defendants *East*, *Thorpe* and *Balfour*, in support of the deed.

(a) 8 Sim. 472.

1853.  
  
 BOULCOTT  
 v.  
 BOULCOTT.

The next question is, who is entitled to the share intended for *John Almon Boulcott*. The testator by his will gave his real and personal estate to trustees; in trust, in the first place, to pay his debts and funeral and testamentary expenses, &c., and certain legacies; and, subject to those, upon certain trusts (The Vice-Chancellor referred to the bequest in favor of the testator's nephews and nieces, p. 26).

Now, this is a gift to the nephews and nieces, not as a class, but as individuals. In one sense they are a class, that is, as the testator's nephews and nieces; as persons to whom he gives particular shares of his property; but the gift is to them as individuals, nephews and nieces nominatim, and expressly as tenants in common. If upon the language of this will I were to hold them not to be tenants in common, I should be overturning the settled law upon this subject; for what the testator says is in effect this: I give to *John* one-eighth, to *Joseph* one-eighth, &c. Then he directs the shares of the nephews to go to them absolutely, and the shares of the nieces to be subject to powers of appointment, &c., and then comes the proviso.

Now, there was an absolute gift of one-eighth, in the events which have happened, to *John*, and then comes the codicil in which the testator revokes his gift as to *John*. If there had been no revocation, *John* would clearly be entitled. I think, therefore, that as to that share, the heir at law and next of kin must take.

As to *Joseph's* share, the case is not quite so clear. To *Joseph* there is a gift of one-eighth absolutely, subject to this, that if he dies in the testator's lifetime, leaving a child or children, they are to take. But then it is pro-

vided that if he dies without leaving child or children, the event which has happened, then the share which he would have taken is to go to the survivors or others; so that if there had been no revocation, *Joseph*, in the events which have happened, having died without issue, his one-eighth would have gone over to the other seven. But then comes the revocation. The question suggested is, whether the gifts over are to be dealt with with reference to the revocation only, or with reference to *Joseph* having died without leaving children. But, as *Joseph* was living when the testator revoked the gift, the testator must have had in his contemplation that he had given to *Joseph* a one-eighth share, with limitations over in one event to his children; in another to the other nephews and nieces. He means, I think, nothing of this to take effect. He revokes it altogether, not merely as to *Joseph's* individual interest, but as to the limitations of his share, which were to take effect in certain events. I am of opinion that the revocation is absolute as to the whole of that share, and that it goes to the heir at law and next of kin.

As to *Henrietta's* share, his Honor held, that as, if she had survived the testator, she would have been entitled to one-eighth, and as her one-eighth went over to the other seven, one-seventh of her one-eighth would have gone to *John* and one-seventh of the one-eighth to *Joseph*; and that as the testator's directions applied equally to the accruing and to the original shares, the former were revoked as well as the latter, and passed to the heir at law and next of kin.

1853.  
  
 BOULCOTT  
 v.  
 BOULCOTT.



## ENON IN CHANCERY.

... should not exceed 150*l.*, to pay ... to the minister; but if his salary exceeded 100*l.*, then the 40*l.* was to be applied towards the payment of the debt upon the chapel. £30, further ... the annuity, was to be paid to the treasurer for the being of a certain society at the chapel for assisting and relieving the sick poor, so long as that society should raise an additional sum from other charges of 30*l.* so as to make 60*l.* a year. Then 5*l.*, other part of the annuity, was to be paid to the treasurer of the Sunday School at Enon Chapel. £10 a year was to be paid to the treasurer of the General Baptist Home Mission of the London connexion; and the remaining sum of 10*l.* was to be disposed of at Christmas in every year in food and clothing among the poor at Enon Chapel, at the discretion of *Burns* and *Makins* and the minister. A few years afterwards, namely, in the year 1843, *Makins* ceased to be a trustee, and *East* was substituted in his place, and a deed was executed for that purpose.

Now, upon the face of the deed, there does not appear to be any objection whatever to it. All the requisitions of the statute are apparently complied with. The gift is made by deed, indented, sealed and delivered in the presence of two credible witnesses more than twelve calendar months before the death of the grantor. The deed was duly enrolled in Chancery within six months after its execution. The gift is, by the terms of the instrument, made to take effect in possession for the charitable uses intended immediately on the making thereof; and the deed contains no power of revocation, reservation, trust, condition, limitation, clause or agreement whatsoever for the benefit of the grantor or of any person or persons claiming under him. So that, on the face of the deed, all the requisitions of the statute are observed.

The Plaintiffs, however, insist that there was an agreement or understanding or design, among the parties to the deed, that payment of the annuity was not to be enforced during the life of *Gwennap*, the grantor, and upon this ground they contend that the grant ought to be declared void. Now I have no hesitation in declaring my opinion that if such an agreement or understanding existed among the parties when the deed was executed, or if such was the design of the grantor in executing the deed, and that design was acquiesced in and acted upon by all parties, it is not necessary that such design should be expressed on the face of the deed in order to bring the case within the Statute of Mortmain; but this Court would regard the transaction as a fraud on the statute, and declare it void. But the *onus* of proving such an agreement or understanding or design rests of course on the Plaintiffs who allege it. They rely on several facts in support of their allegation, which facts I must consider in their order.

I may here mention, however, that Mr. *Gwennap*, the grantor, lived until the month of November, 1850, and this bill is filed by parties claiming under his will, and is filed by leave of the Court, granted in a suit to administer his assets.

Now the first fact brought forward by the Plaintiffs, in support of their contention, is, that when the formality of enrolment had been duly concluded by Mr. *King*, the conveyancer, who had prepared the deed, and who was one of the trustees of the term of the leaseholds to secure the annuity, instead of the deed being handed over to *Burns* and *Makins*, the trustees and grantees of the annuity, he *King* delivered it to *Gwennap*, the grantor, and that it remained in *Gwennap's* custody for

1853.

WAY  
v.  
EAST.

1853.

W<sup>AY</sup>  
v.  
E<sup>AST</sup>.

many years thereafter. Now, I confess, that this fact, if it stood by itself, would not appear to me to be of much weight. No doubt the proper custody of the deeds was with the trustees, but as *Gwennap*, the grantor, was not only a member of the congregation of the chapel, but a liberal patron of it, and of the charities connected with it, as well as the treasurer of the institution, the leaving the deed in his custody does not seem to me to be such a deviation from the regular course as to carry with it any great weight. Still this circumstance, when taken in connection with other facts, may not be altogether without significance.

The next fact is, I think, of far more importance, namely, that whereas *Gwennap*, the grantor, lived nearly twelve years after the execution of the deed, not one farthing of the annuity of 95*l.* was ever paid, nor was any attempt ever made to enforce its payment. To counteract the very strong inference which this fact is calculated to produce, it is insisted, on behalf of the Defendants, that, although the annuity itself was never paid, yet Mr. *Gwennap*, who before the execution of the deed had been a liberal benefactor to the chapel and its charities, continued to be so down to the time of his death, and that his voluntary contributions to the charitable institutions and objects contemplated by the deed were in each year, at least, equal in amount to what he would have been compelled to pay if the deed had been enforced against him. The evidence on which this allegation rests is to be found in the depositions of the Defendants *East* and *Burns*. I have carefully examined those depositions, and I have also minutely inspected the account-books which are in evidence—the books kept by the treasurer of the chapel, as well as the minute book, and from that examination I have been led to the following conclusions.

In the first place, the allegations of the witnesses that the total amount of *Gwennap's* contributions to charity amounted in each year, or upon an average of years, to 95*l.* a year, seems to me to rest on conjecture rather than to be the result of any actual and accurate knowledge possessed by them; and the impression left on my mind is, that the fact, to say the least, is very doubtful.

1853.

WAX  
v.  
EAST.

In the second place, it is clear that, even supposing that fact to be as alleged, namely, that the total amount of *Gwennap's* contributions to charity amounted in each year, upon an average, to 95*l.* a year, still the truth of it is only attempted to be made out by including in the list of charities on which those voluntary contributions were bestowed, some charities which are not among those specified in the deed as the objects of the trust, including all *Gwennap's* private alms doled out to the sick and poor.

And thirdly, it is still more clear that even as to those charitable objects mentioned in the deed, which did derive some benefit from *Gwennap's* voluntary contributions, scarcely one of them, if any, derived a benefit equal to that to which it was entitled under the deed. As an instance of this, although *Dr. Burns* says in his evidence, he should presume that *Mr. Gwennap* contributed 40*l.* a year to the reduction of the debt on the chapel—he should presume he did so—yet when I turn to the treasurer's book, kept by *Gwennap* himself, not only is there no trace of a single farthing having been contributed by him for that object, but I find that from January, 1840, down to *Gwennap's* death, the same sum in each year was paid for interest on the debt, namely, 27*l.* a year, indicating that during that period there was no reduction whatever in the amount of the debt; and the interest is always paid out of the general income of the chapel, to

1853.

WAY

v.

EAST.

which Mr. *Gwennap* did not contribute a single shilling, unless in the form of a pew rent.

I do not, however, think it necessary to occupy time by pointing out all the details of evidence which have led me to these conclusions as to the facts, because after all I cannot admit that spontaneous and irregular and occasional acts of charity done by Mr. *Gwennap*, whatever their amount, can be taken in satisfaction and discharge of his liability under the trust deed, especially where it is clear that *Gwennap* himself never entertained the least notion to this effect, at least until the latter end of the year 1847, when an idea was suggested and adopted in order to carry out a scheme which I shall presently have occasion to refer to. Indeed, Dr. *Burns* tells us in his evidence, that he does not think that if *Gwennap* had been called upon by the trustees under the deed, it would have affected the amount of his voluntary contributions. So that the effect of the nonpayment of this annuity, during the whole of the period from the execution of the deed down to the death of *Gwennap*, a period of somewhere about twelve years, remains without any explanation, or any thing satisfactorily to account for it.

I proceed now to a third fact on which the Plaintiffs rely; and whatever may be thought of those two facts which I have hitherto been discussing, I must confess that this fact does appear to me all but conclusive to prove that the design of the parties to the deed was, that it was not to come into operation until a future period. The fact to which I refer is, the careful concealment of the existence of the deed, and of every one of its trusts and purposes, from the members of the congregation of the chapel, and from the deacons and helps, and other officers of the chapel, and from the

treasurer and committees of the several charities mentioned in the deed, and, in fine, from every other human being until the month of June, 1850—a period of eleven years and upwards from its foundation; and it appears then to have been disclosed only for the purpose of effecting a scheme, to which I shall hereafter have occasion to advert. I say, “careful concealment,” for it could not have been accidental. Such a suggestion would be utterly incredible, and no one has ventured to make it. I confess I do not see how it is possible to account for this concealment, except upon the assumption that the deed was not intended to be enforced during that time. Why were the congregation and the officers of the chapel to be studiously kept in ignorance that a deed had been executed, making present provision for the application of 40*l.* a year to increase the minister’s salary, or in case of that salary exceeding 150*l.* a year, then to the reduction of the debt on their chapel? Why were the treasurer and committees of the visiting society to be kept in ignorance that 30*l.* a year was provided for the purposes of this institution on condition that they raised from other sources another 30*l.* a year for the same purposes? Why were the ministers of the Sunday school, or the treasurer and members of the Baptist House Mission, to be kept in ignorance of the benefits provided by the deed for those respective institutions? Why, but to prevent the possibility of any one interested in those charities from insisting on the enforcement of the trusts and provisions of the deed against Mr. *Gwen- nap*. The retention of the deed by Mr. *Gwennap*, and the non-payment of the annuity, are facts for which, though not without significance, it is still possible to suggest something like an explanation or excuse, more or less plausible; but I confess I do not perceive how, consistently with the supposition of the total absence of

1853.



WAY

v.

EAST.

1853.

WAY

V.

EAST.

any design to postpone the operation of the deed, it is possible to explain or account for the non-communication of its existence to those who were so much interested in it, and to whom the tidings of Mr. *Gwennap's* beneficence would have been so welcome. The concealment of the deed and of its provisions were, beyond doubt, designed and studied, and appear to me to involve the irresistible inference that there existed from the first among the parties to the deed, a design that the deed should not be immediately put in force, and that the payment of the annuity should not commence till a future period. And if this be the inference to be deduced from the fact of the concealment of the deed and of its provisions, what strong corroboration does not that inference derive from the nature of the information which Dr. *Burns* tells us he did communicate on the subject of Mr. *Gwennap's* intended bounty to the chapel and its charities. He says in his deposition: "I never did communicate previous to the meetings of 1850 to any meeting the fact of the execution of the deed by Mr. *Gwennap*. All that I ever did was to communicate generally that the charities *would be* benefited by Mr. *Gwennap* in the course of a few years. I mentioned to individuals casually, in the course of conversation, the fact that the charities *would be* benefited by Mr. *Gwennap*." So that not only did Dr. *Burns* during eleven or twelve years carefully suppress the fact, that there existed a deed by the express terms of which the charities were then entitled to a present benefit, and which benefit he now insists was never intended to be withdrawn or postponed for a single hour, but he did communicate the intelligence that a future benefit to the charities was to be expected from Mr. *Gwennap*, implying, of course, that they were entitled to no present benefit. In order to maintain this grant, Dr. *Burns* now endeavours to make us

believe that he not only carefully suppressed the truth, but that he made communications which necessarily implied falsehood. I am satisfied that Dr. *Burns* is not open to the imputation which he thus seems to invoke on himself. In concealing the existence of the deed, and in communicating the intelligence that a future benefit, and not a present one, would come to the charities from Mr. *Gwennap*, Dr. *Burns* was acting in conformity with that which all the *res gestæ* of the case combine in showing to have been the real truth, namely, that the benefit to the charities was designed to be future and not present, and therefore that it was prudent to keep the deed concealed, because, by its express terms, the benefit was present and not future.

1853.

WAT  
v.  
EAST.

The next circumstance relied on in support of the Plaintiffs' contention is, the giving of the memorandum of the 29th December, 1847. There seems no reason to doubt what was the reason and purpose of that transaction. It was evidently occasioned by the apprehension felt by Mr. *Gwennap* (whether spontaneously occurring to his own mind, or suggested to him by some member of his family, is immaterial), lest at some future time he or his executors after him should be called upon to pay up the arrears of the annuity from the date of the deed, which, by the express terms of the deed, he was liable to pay, but which it was never intended he should pay. The arrears already at that time amounted to upwards of 700*l*. To relieve Mr. *Gwennap's* mind from this apprehension, it was arranged between him and the trustees of the annuity, that they should give him a release, or what purported to be a release, and accordingly the trustees, *Burns* and *East*, signed and delivered to *Gwennap*, the memorandum in question, dated 29th December, 1847, by which they professed to discharge him from all



1853.

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WAY

v.

EAST.

claims up to that time, and, indeed, to renew the same discharge every half-year during his life. Now this transaction, even when regarded under this general aspect, appears to me to afford no slight confirmation of the inference, that the annuity was never intended to be demanded or paid during the grantor's life; but when we come to examine more closely the terms in which the memorandum itself is couched, it seems to supply most cogent evidence in support of the Plaintiffs' case. The trustees therein described themselves as being, "the legally appointed trustees and executors of certain bequests and annuities left by Mr. *Thomas Gwennap* to Enon Chapel, and benevolent institutions connected therewith." Now the instrument sets out with a recital in the form of a declaration and affirmation by the trustees, that "they are fully aware that Mr. *Thomas Gwennap* bequeathed the said annuities by bond or gift in January, 1839, to meet the legal difficulties arising from the law of Mortmain, but designing that the said annuities should not be paid till after his death." Then follows another recital, "that in lieu of these annuities he, *Gwennap*, has during his life, contributed to the said charities liberally." And then it proceeds thus, "Therefore we do hereby declare that we could not, in justice, demand any of the annuities until it shall please Divine Providence to remove by death Mr. *Thomas Gwennap*, and in proof of our purpose and intention, and for the satisfaction of Mr. *Gwennap* and his heirs, we do attach our names to this document, which we wish to be our entire discharge of all claims on the said bond up to this date, and also engage to renew the same discharge every half-year during the life of Mr. *Thomas Gwennap*."

After all the very ingenious and elaborate arguments which have been urged with a view to explain away the

effect of this document, I confess the impression it makes on my mind is *habemus confitentem reum*. It appears to me that it amounts to a deliberate and explicit declaration by the principal parties to the deed, that the wish and purpose of Mr. *Gwennap* was to leave the annuity to the several charities so as to take effect at his death, the most natural and obvious mode of doing which would have been by testamentary bequest. But the law of Mortmain prohibited this and made it necessary that it should be done by deed *inter vivos*, and expressed to take effect *in præsentia*; that for that reason only *Gwennap* had resorted to the mode of doing it by deed in that form, but that notwithstanding the terms of the deed his design continued to be that the annuity should not be paid till his death; that the trustees are fully aware of this, and for that reason and also by reason that Mr. *Gwennap* has been a liberal contributor to Enon Chapel and the charitable institutions connected with it, they, the trustees, signed the memorandum for the satisfaction of *Gwennap* and his heirs, that is, in order to remove any apprehension that he or his family might entertain as to the liability being ever enforced on him, according to the terms of the deed. This appears to me to be the scope and meaning of the instrument, to be deduced not only from the expressions which so repeatedly occur, pointing to the testamentary character of the gift, but from every passage of it from the beginning to the end. The reference to *Gwennap's* liberal contributions to the charities is evidently thrown in by way of suggesting an additional reason why *Gwennap's* design of nonpayment should be effectuated, and not as expressing any notion that his voluntary contributions up to that time should be taken and considered as payments in satisfaction and discharge of his liability under the deed. In fact, whatever ground there could have been for the suggestion that

1853.

WAT

v.

EAST.

1853.

WAY

v.

EAST.

these voluntary contributions should be taken in discharge of past liability, it would be quite absurd to suppose that the parties meant to regard them as discharging all future liability during the rest of his life, and as forming a sufficient consideration for the engagement to renew the discharge every half-year while he lived.

I may, in passing, make this observation, as bearing on a part of the case which I have before considered, that the parties to the instrument, in referring to the liability of *Gwennap's* contributions, do not venture to allege that the amount of them, either in the aggregate, or as regarded the respective charitable objects, was equal to what would have been payable according to the terms of the deed.

Another transaction took place a few years later, the bearing of which has the same confirmatory tendency as that of the memorandum of 1847. In June, 1850, a few months before *Gwennap's* death, it occurred to Dr. *Burns* that he and his co-trustee might find themselves in an awkward predicament, in respect of this trust deed, when its existence should be disclosed after *Gwennap's* death. For whereas, according to the terms of the deed, it was their duty to have received from *Gwennap* 95*l.* every year, and to have applied it according to the trusts, they had not only omitted to do so, but had given an undertaking that so far as in them lay, he should never be called upon for payment during his life. So that there was ground for apprehending that the trustees themselves might, at some future time, be held personally responsible. To relieve the trustees from this danger, the following scheme was arranged and carried into effect. *Gwennap* drew a cheque on his bankers for 1045*l.*, which was the amount that would have been due

for the arrears of the annuity, according to the provisions of the deed. Dr. *Burns* carried the cheque the same evening to a meeting of the deacons and other officers of the chapel. They concurred in his proposal, that it should be returned to *Gwennap*, and accordingly at the termination of the meeting, *Burns* carried back the cheque to *Gwennap*, and took his receipt for it. At the next general meeting of the chapel, that act of the officers was confirmed. That was the transaction.

1853.

WAY  
v.  
EAST.

Now, upon a careful consideration of all the circumstances affecting this transaction, and especially the form and language of the cheque, the terms in which the minute of the resolution of the meeting is entered in the books, and the language of the receipt given by *Gwennap* for the cheque, together with the fact that *Gwennap's* balance at his bankers, at the date of the cheque, was only 175*l.* and a fraction, and at no time, for at least five years, had he sufficient funds in his bankers' hands to pay one-third of the amount of the cheque, I am quite satisfied that the whole transaction was merely a contrivance to exonerate the trustees from responsibility, by affecting a sham payment, and that it never was intended by *Gwennap* or Dr. *Burns* that the cheque should ever be presented for payment. And I arrive at the conclusion wholly irrespective of *Jane Gwennap's* evidence. I regret that Dr. *Burns* should have permitted himself to state, as he does in one of his answers, that he believed that it was intended by *Gwennap* that the cheque should be presented for payment, and I wish I could altogether concur in the ingenious arguments by which his able counsel have endeavoured to explain away that statement. If the cheque was given by *Gwennap* with the intention that it should be presented for payment, and it was so received by Dr. *Burns*, and was presented to the

1853.

WAY

v.

EAST.

meeting as a cheque *bonâ fide* drawn and intended as a payment of the arrears of the annuity, then in fact *Gwennap* did pay the whole annuity under the deed, up to January, 1850; and yet Dr. *Burns* says in his deposition, that no payment was ever made by Mr. *Gwennap* under the deed. And he says so with perfect truth: no payment ever was made, the giving this cheque was no payment; and why was it no payment? Because it never was intended to be presented for payment; and the giving and returning of the cheque was a mere piece of machinery, intended to exonerate the trustees from responsibility. The transaction is most correctly described in the case submitted to counsel, on behalf of Dr. *Burns* and others, as having been "a pseudo-payment." The very party, who, on behalf of Dr. *Burns*, framed the case, so regarded the transaction, and so stated it to counsel for their opinion, and nobody who does not wilfully blind himself to the truth, can fail to come to the same conclusion.

The facts which I have been hitherto considering, are those with respect to which (i.e. with respect to the existence of the facts) there is no controversy. In considering them separately, as I have hitherto done, I should say that some of them are capable of more or less explanation or extenuation; others of them it is very difficult, perhaps impossible, to reconcile with the theory that all the parties to the deed intended that it should come into immediate operation. If such be a fair and just estimate of the several facts when regarded separately, and each as standing by itself, I confess that when I view them in conjunction and as a whole, each illustrated by the light reflected upon it by the others, it appears to me that there is such a body of evidence as is quite sufficient to convince a sound and temperate judg-

ment, beyond reasonable doubt, that there did exist at the time of the execution of the deed of 1839, and during all the subsequent time, a design among the parties to the deed, that the payment of the annuity should not commence till the death of Mr. *Gwennap*.

1853.

W

WAT

r.

EAST.

I have thus far abstained from referring to the parol testimony. The principal witnesses, whose evidence directly affects this question, are, on the one side, Mr. *Wyatt*, Miss *Gwennap* and *Eliza Geary*; and on the other, Dr. *Burns*. *Eliza Geary* was servant of all work in the family of Dr. *Burns*, and she deposes to having often heard Dr. *Burns*, in the course of conversation, say, that he and the chapel would benefit by Mr. *Gwennap's* death, and that he wished *Gwennap* to leave 95*l.* a year as an annuity to the chapel, and this was the benefit which the chapel, he said, would get by his death. Now I cannot say that I am disposed to attribute much weight to the evidence of a servant of all work, consisting of scraps of conversations, which, in going in and out of the room about her menial duties several years ago, she happened to pick up and put together in her own memory. Such a person, under such circumstances, without attributing to her any intention of perjury, is so liable to be mistaken, and the species of evidence so little to be relied upon, that I think it safer to disregard the testimony of this witness.

With respect to Miss *Gwennap*, she is one of the daughters of *Gwennap*, the grantor, and she deposes to conversations between her father and Dr. *Burns*, which, supposing them to have taken place, would prove a full understanding to have existed, that payment of the annuity was not to be required till *Gwennap's* death. I feel myself under the painful necessity of disregarding

1853.

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WAY

v.

EAST.

the testimony of this witness, on the ground that on more occasions than one her conduct has been such as to render it impossible to place confidence in her veracity and plain dealing.

The deposition of the witness *Wyatt* stands upon a very different footing from that of either of the two last-named witnesses. At the time of the execution of the deed, he was employed by *King*, the conveyancer, as a collector of rents; and he was present when the deed was executed in the office of Mr. *King*, and is one of the attesting witnesses. He deposes that on the occasion of the execution of the deed, when *Gwennap* and *Burns* attended at *King's* office for that purpose, *King* said that there would not be any benefit derived therefrom till after *Gwennap's* death, and that *Gwennap* asked *King* whether he thought it necessary that a paper should be drawn up to that effect; to which *King* answered, that he did not see any necessity for it, but that *Gwennap* could have it if he thought proper. Now, supposing such a conversation to have taken place, there is an end of the question upon which the parties are now at issue. Dr. *Burns*, however, who has been examined as a witness, distinctly denies that any such conversation took place, as that which is deposed to by *Wyatt*. If then the whole case depended upon the testimony of these two witnesses, I should have to consider their relative claims to credibility. The moral character of each stands unimpeached. How do they respectively stand as to intelligence and capacity to understand and report what passed on the occasion? In this respect I do not see any ground of preference. *Wyatt* would appear, from his position, to have possessed quite sufficient capacity and experience in ordinary matters of business, to enter fully into the meaning of any conversation of this nature, at



which he might happen to be present. How do they respectively stand as to interest? *Wyatt* appears to be absolutely without any interest whatever, direct or indirect. It is impossible to say the same of *Dr. Burns*; he has not only a direct pecuniary interest, inasmuch as the deed gives him 40*l.* a year, if ever his salary as minister does not exceed 150*l.* a year, but he has an indirect interest of a still more influential character,—I mean the interest which the minister of a Dissenters' chapel cannot but feel (and honestly feel) in having his chapel, and the charities connected with it, liberally endowed. As to the question of interest, therefore, certainly *Wyatt* and *Dr. Burns* stand on a very different footing. How do they respectively stand with respect to the fairness and ingenuousness with which they have given their testimony throughout? The only attempt which has been made to throw discredit on *Wyatt's* evidence is, by showing that when he was examined at the Old Bailey, on the trial of *Dr. Burns* for perjury, though he stated the former part, he did not state the whole of what he now deposes to as having passed between *King* and *Gwennap*, on the occasion of the execution of the deed; and, therefore, it is contended, the whole is to be treated as a fabrication. I cannot concur in this view; even if the questions put to him at the Old Bailey were such as were calculated to elicit a statement of all that passed, and he had omitted a part; even then it would be rather a strong conclusion that the whole was fabricated. But, in fact, we have no means of knowing what the questions were which were put to him; and, in his cross-examination in this suit, he explains that the reason why his statement at the Old Bailey was less full than that which he now makes, was, that he was not asked. I see nothing unfair or disingenuous in the tone or character of *Wyatt's* evidence. I certainly cannot say so much of *Dr. Burns's* testimony. Not only does it indicate throughout an interested and zealous

1853.

WAT  
v.  
EAST.



1853.

WAY  
v.  
EAST.

partizan, anxious to represent matters in such an aspect as would be most conducive to a certain desired result, but there are some parts of it which have struck me as peculiarly disingenuous. I will mention an instance. It was obvious that the non-payment of the annuity would be strongly insisted upon as a fact unfavourable to the validity of the deed, the more especially as the first trust was to pay 40*l.* a year to the minister of the chapel, which minister was Dr. *Burns* himself; for it would of course be asked, how came it that Dr. *Burns* never required payment of his own 40*l.*? It would be a short and conclusive answer to this question to say, Dr. *Burns* never was entitled to the 40*l.* a year, for it was given to him on condition that his salary as minister did not exceed 150*l.* a year; and his salary always did exceed that amount. It was, therefore, an object to make out that Dr. *Burns's* salary always exceeded 150*l.* a year. Accordingly, in his deposition, Dr. *Burns* says: "In 1839, my receipts as minister exceeded 150*l.*, I think, and continually increased from that period; I have the pew rents of the chapel." And in another place he says: "I have no interest in the deed, unless my salary falls below 150*l.* My salary has always increased from 1839 up to the last quarter." Now, from reading this, I should have inferred that what Dr. *Burns* meant to say was, that from the time of the execution of the deed in 1839, his salary, or if not the *salary* strictly so called, at all events his receipts as minister, had always exceeded 150*l.* a year; and that his receipts as minister consisted partly of salary and partly of the pew rents. From a careful examination of the two account books kept by the treasurer, and the minute book of the meetings, I find the following to be the facts: Dr. *Burns* became the regular minister of the chapel in 1835, at a salary of 120*l.* a year, his predecessor's salary having been 80*l.* That salary of 120*l.*

was continued to Dr. *Burns* down to Christmas, 1842, after which time it was increased to 140*l.*, in pursuance of a resolution of a church meeting held on the 23rd of February, 1843; that his salary continued to be 140*l.* down to Christmas, 1846; that a resolution was passed at a meeting of deacons, trustees, and helps, held on the 11th of January, 1847, that the minister's salary should be for the future 180*l.* a year, and if the funds of the church would admit of it, 200*l.* a year; that accordingly from that time the salary was 180*l.*, and so continued down to the death of Mr. *Gwennap*; that during the whole of that period from the execution of the deed the minister never received a single shilling of the pew rents; on the contrary, they were always received by the treasurer, and by him regularly brought to account in his books, as part of the general income of the chapel, out of which the minister's salary and the other expenses of the chapel were regularly paid; but at a deacons' meeting, held at the close of a church meeting on the 14th of November, 1850, being a few days after the death of Mr. *Gwennap*, it was resolved that in future the entire proceeds of the seat rents, and of the monthly church fund, should be appropriated to and received by the minister in lieu of a fixed salary, and that in the event of the amount falling short of 200*l.* per annum, that sum should be made up from other sources: and, accordingly, on turning to the treasurer's books, I find that from that time the pew rents and monthly church fund, which up to that time had been regularly brought to account as part of the stated income of the chapel, cease to appear as part of the income; and the minister's salary, which up to that time had been regularly entered as part of the usual disbursements, ceases to be debited: so that for the first eight years after the execution of the deed, the minister's salary was under 150*l.* a year; Dr. *Burns* never having had a shilling of the pew rents

1853.

  
 WAY  
 v.  
 EAST.

1853.

WYATT  
v.  
EAST.

during *Gwennap's* life, nor is there a trace of anything else having been received by him as minister; and though Dr. *Burns*, in giving his evidence in 1853, could say with strict adherence to the *letter* of the truth, "I have the pew rents of the chapel," yet the inference which any one would draw from that statement, with its context, that he had them while *Gwennap* lived, and that they were an addition to his salary, has no sort of foundation in fact. I might point out other parts of Dr. *Burns's* evidence which renders it impossible for me to regard him as a witness whose object is to state the whole unvarnished truth with a total disregard to consequences. If, then, I were compelled to decide on the degree of credit which is due to *Wyatt* and Dr. *Burns* respectively upon any point on which their evidence was in direct conflict, I am bound to say that I should give it in favour of *Wyatt*. But after all they are not *necessarily* in conflict. *Wyatt* says that a certain conversation took place between *King* and *Gwennap* in a room where *Burns* was present; *Burns* says that no such conversation took place, i. e.—that he did not hear any such conversation; and they are only *necessarily* in conflict, if it was physically and absolutely impossible for such conversation to take place without Dr. *Burns* hearing it.

I have perhaps given more time to the discussion of the parol evidence than was necessary, because the question really is, whether Dr. *Burns's* denial of the existence of any agreement with *Gwennap*, that the deed should not come into operation till his death, is sufficient to do away the overwhelming weight of the evidence the other way arising out of facts which are really not in dispute. To my mind the evidence against the validity of the deed is sufficient without the parol proof of conversations; and I must declare the deed to be void, and decree that it be set aside.

GEORGE RICE, LYDIA RICE and WILLIAM  
NAIL and HANNAH his Wife v. MICHAEL  
RICE, JOSEPH EDE and STEPHEN KNIGHT.

1853:  
15 and 16 Dec.

*Priority.  
Equities,  
priority  
between.*

**THIS** was the hearing of the cause on a motion for a decree. *Michael Rice*, the first Defendant, purchased from *George Rice*, *E. Moore* and his wife, *Lydia Rice* and *W. Nail* and his wife, certain leasehold property. On the execution of the assignment *E. Moore* received his share of the purchase-money; but no money was received by the other vendors, who allowed the payment to stand over for a few days on the promise of the purchaser then to pay. However, the assignment recited the payment of the whole purchase-money, and the usual receipt was endorsed on it, and the other title deeds were delivered up to the purchaser.

Vendor conveyed without receiving his purchase-money; the receipt of it was endorsed on the deed, and the title deeds delivered to the purchaser. The purchaser then made a mortgage by deposit, and absconded: Held, as between the vendor's lien for his unpaid purchase-money, and the right of the mortgagee, that the possession of the title deeds, and the fact of the endorsement of the receipt on the deed, gave

The day following the execution of the deed, *Michael Rice* deposited the assignment and title deeds with the Defendants *Ede* and *Knight*, with a memorandum of deposit, to secure an advance. *Rice* then absconded, without paying either the vendors or the equitable mortgagees.

These were the principal facts of the case. The other material circumstances will be found stated in the judgment. The bill was for payment of the purchase-money, or for sale of the premises; and it being admitted that

the mortgagee the better equity.

Principles of the rule as to the effect of priority in point of time.

1853.  
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 RICE  
 and Others  
 v.  
 RICE  
 and Others.

there was not enough to pay both the vendors and the equitable mortgagees, the question in the cause was, which ought to have priority, the vendors or the equitable mortgagees.

Mr. *E. F. Smith*, for the Plaintiffs.

This question was raised but not decided in *Nairn v. Prowse* (a). In principle, however, the point has been decided. In *Macreth v. Symmons* (b), the lien of a vendor is much considered. According to that case the lien of the Plaintiffs would prevail, unless the deposit of the deeds make a difference: *Allen v. Knight* (c).

It is quite true that here the vendors put it in the power of the purchaser to commit a fraud. But on the other hand, the mortgagees might have taken, and have not taken, the legal title.

There being a receipt endorsed on the deed is of no consequence, for, whether it is or not, the lien prevails: *Allen v. Knight*, on appeal (d); *Plumb v. Fluit* (e); *Barnett v. Weston* (f). So the mere letting the title deeds go and remain out of the possession of the vendors, the persons having the first incumbrance, does not postpone them; for they could not have refused to deliver up the deeds: *Goode v. Burton* (g). The conclusion, justified by the authorities on this point, is, that, unless there is either fraud or wilful negligence in the party

(a) 6 Ves. 752.

(b) 15 Ves. 328.

(c) 5 Hare, 272.

(d) 11 Jur. 527.

(e) 2 Anstr. 572.

(f) 12 Ves. 130.

(g) 1 Exch. 189.

allowing the deeds to go out of his possession, his priority shall not be disturbed.

In this case the dates and other facts are material. The purchaser was known by the mortgagees to be in embarrassed circumstances, and they find him producing to them a conveyance executed only the day before, and that by a marksman. This was enough to put them on their guard.

Mr. *Elmsley* and Mr. *J. V. Prior*, for the Defendants, the mortgagees.

The question is, whether an equitable mortgagee, having possession of the deeds, and that in consequence of the act or omission of another incumbrancer who might have kept them, is to be deprived of the possession of those deeds, or of the benefit of that possession. They cited 3 *Sugd. Vend. & Purch.*(a); *Stanhope v. Verney*(b); and in *Butler's note*, *Coke*, *Litt.*(c); *Mangles v. Dickson*(d). What was there to show to the mortgagee that the title of his mortgagors was not complete? The deed itself showed the money to have been paid: *Foster v. Blackstone*(e). The possession of the deeds is an addition to our equity, which is in other respects equal to the Plaintiffs', and that gives us priority: *White v. Wakefield*(f); *Maundrell v. Maundrell*(g). Besides, the right of the Plaintiff is a lien,—a mere equitable charge: it is no *estate*. But an equitable mortgagee has an actual estate.

1853.

Rice  
and Others  
v.  
Rice  
and Others.

(a) Page 218.

(b) 2 Eden, 81.

(c) Page 290.

(d) 1 M. & G. 437.

(e) 1 My. & K. 297.

(f) 7 Sim. 401.

(g) 10 Ves. 271.

1853.  
 Rice  
 and Others  
 v.  
 Rice  
 and Others.

The observations made in the 3rd volume of Sir *E. Sugden's Vendors & Purchasers* (a) shows that in *Macreth v. Symmons* the question was one of lien, speaking only of it as between the vendor and purchaser. In *Macreth v. Symmons* it is clear there was not and could not be any receipt endorsed, because it is plain the consideration was not money passing between the parties. A party who does not receive his purchase-money, but puts forth a statement that he has received it, has not so good an equity as the man who seeing such a statement, trusts to it.

Mr. *E. F. Smith*, in reply.

*Stanhope v. Verney* does not support the Defendants' case. All that it decides is, that when there is a declaration of trust of a term and deposit of the deeds, that gives a preferable equity, being equivalent to an assignment. But here all that the Defendants have is an agreement executory. There can be no laches imputed to the vendors for letting the title deeds go out of their hands in a case like this, where the legal title to the deeds was in the party in whose hands they were allowed to remain. *Wiltshire v. Rabbits* (b) was also referred to.

1854.  
 Jan. 12.  
 Judgment.

The VICE-CHANCELLOR took time to consider, and on the 12th January delivered the following judgment:—


The question to be decided in this case is, whether the equitable interest of the Plaintiffs in respect of the vendor's lien for unpaid purchase money, is to be preferred to the equitable interest of the Defendant *Ede* as equitable mortgagee.

What is the rule of a Court of Equity for determining

(a) Page 202.


(b) 14 Sim. 76.

the preference as between persons having adverse equitable interests? The rule is sometimes expressed in this form:—"As between persons having only equitable interests, *qui prior est tempore potior est jure*." This is an incorrect statement of the rule; for that proposition is far from being universally true. In fact not only is it not universally true as between persons having only equitable interests, but it is not universally true even where their equitable interests are of precisely the same nature, and in that respect precisely equal; as in the common case of two successive assignments for valuable consideration of a reversionary interest in stock standing in the names of trustees, where the second assignee has given notice, and the first has omitted it.

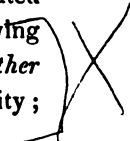
1854.  
  
 RICE  
 and Others  
 v.  
 RICE  
 and Others.

Another form of stating the rule is this:—"As between persons having only equitable interests, if their equities are equal, *qui prior est tempore potior est jure*." This form of stating the rule is not so obviously incorrect as the former. And yet even this enunciation of the rule (when accurately considered) seems to me to involve a contradiction. For when we talk of two persons having equal or unequal equities, in what sense do we use the term "equity?" For example, when we say that A. has a better equity than B., what is meant by that? It means only that according to those principles of right and justice which a Court of Equity recognizes and acts upon, it will prefer A. to B., and will interfere to enforce the rights of A. as against B. And therefore it is impossible (strictly speaking) that two persons should have equal equities, except in a case in which a Court of Equity would altogether refuse to lend its assistance to either party as against the other. If the Court will interfere to enforce the right of one against the other on any ground whatever, say on the ground of priority of



1854.  
  
 RICE  
 and Others  
 v.  
 RICE  
 and Others.

time, how can it be said that the equities of the two are equal; i. e., in other words, how can it be said that the one has no better right to call for the interference of a Court of Equity than the other? To lay down the rule therefore with perfect accuracy, I think it should be stated in some such form as this:—"As between persons having only equitable interests, if their equities are *in all other respects* equal, priority of time gives the better equity; or, *qui prior est tempore potior est jure.*"




I have made these observations, not of course for the purpose of a mere verbal criticism on the enunciation of a rule, but in order to ascertain and illustrate the real meaning of the rule itself. And I think the meaning is this: that in a contest between persons having only equitable interests, priority of time is the ground of preference last resorted to; i. e. that a Court of Equity will not prefer the one to the other, on the mere ground of priority of time, until it finds upon an examination of their relative merits that there is no other sufficient ground of preference between them, or in other words that their equities are in all other respects equal; and that if the one has on other grounds a better equity than the other, priority of time is immaterial.


In examining into the relative merits (or equities) of two parties having adverse equitable interests, the points to which the Court must direct its attention are obviously these: the nature and condition of their respective equitable interests, the circumstances and manner of their acquisition, and the whole conduct of each party with respect thereto. And in examining into these points, it must apply the test, not of any technical rule or any rule of partial application, but the same broad principles of

right and justice which a Court of Equity applies universally in deciding upon contested rights.

Now in the present case each of the parties in controversy has nothing but an equitable interest; the Plaintiffs' interest being a vendor's lien for unpaid purchase money, and the Defendant *Ede* having an equitable mortgage. Looking at these two species of equitable interests abstractedly, and without reference to priority of time, or possession of the title deeds, or any other special circumstances, is there anything in their respective natures or qualities which would lead to the conclusion that in natural justice the one is better, or more worthy, or more entitled to protection than the other?

Each of the two equitable interests arises out of the forbearance by the party of money due to him. There is, however, this difference between them, that the vendor's lien for unpaid purchase-money is a right created by a rule of Equity, without any special contract; the right of the equitable mortgagee is created by the special contract of the parties. I cannot say that in my opinion this constitutes any sufficient ground of preference; though if it makes any difference at all, I should say it is rather in favour of the equitable mortgagee, inasmuch as there is no *constat* of the right of the vendor to his lien for unpaid purchase-money until it has been declared by a decree of a Court of Equity; whereas there is a clear *constat* of the equitable mortgagee's title immediately on the contract being made. But I do not see in this any sufficient ground for holding that the equitable mortgagee has the better equity. So far, then, as relates to the nature and quality of the two equitable interests abstractedly considered, they seem to me to stand on an equal footing; and this I conceive to have been the

1854.  
  
 RICE  
 and Others  
 v.  
 RICE  
 and Others.

1854.  
  
 Rice  
 and Others  
 v.  
 Rice  
 and Others.

ground of Lord *Eldon's* decision in *Mackreth v. Symmons* (a), where, in a contest between the vendor's lien for unpaid purchase-money and the right of a person who had subsequently obtained from the purchasers a mere contract for a mortgage, and nothing more, he decided in favour of the former, as being prior in point of time.

If, then, the vendor's lien for unpaid purchase-money, and the right of an equitable mortgagee by mere contract for a mortgage, are equitable interests of equal worth in respect of their abstract nature and quality, is there any thing in the special circumstances of the present case to give to the one a better equity than the other?


One special circumstance that occurs is this, that the equitable mortgagee has the possession of the title deeds. The question therefore arises,—Between two persons having equitable interests of equal worth, does the possession of the title deeds by one of them give him the better equity? In *Foster v. Blackstone* (b), Sir *John Leach*, M. R., says,—“A declaration of trust of an outstanding term, accompanied by a delivery of the deeds creating and continuing the term, gives a better equity than a mere declaration of trust to a prior incumbrancer.” That is a case in which the two parties have equitable interests in the term of precisely the same nature, viz., a declaration of trust of the term without an actual assignment; and there the delivery of the deeds to the subsequent incumbrancer gives him the better equity. To the same effect is the decision in *Stanhope v. Lord Verney*, according to Lord *St. Leonards'* view of it, as reported in *Butler's Co. Litt.* (c) (which seems a more satisfactory

(a) 15 Ves. 329.

(b) 1 Myl. & K. 307.

(c) Page 290 b, note (1), sect. 15.

report than that in 2 *Eden* (a). Lord *St. Leonards* (b) states it thus:—"In *Stanhope v. Earl Verney*, Lord *Northington* held that a declaration of trust of a term in favour of a person was tantamount to an actual assignment, unless a subsequent incumbrancer, *bonâ fide* and without notice, procured an assignment; and that the custody of the deeds respecting the term, with the declaration of the trust of it in favour of a second incumbrancer, was equivalent to an actual assignment of it, and therefore gave him an advantage over the first incumbrancer which equity could not take from him." The same doctrine appears to be recognized by Lord *Eldon* in *Maundrell v. M.* (c), where he says, "It is clear, with regard to mortgagees and incumbrancers, that if they do not get in the satisfied term in some sense, either taking an assignment, making the trustee a party to the instrument, or *taking possession of the deed creating the term*, that term cannot be used to protect them against any person having mesne charges or incumbrances;" implying that taking possession of the deed creating the term would confer on a subsequent incumbrancer such right of protection by means of the term. We have here, then, ample authority for the proposition, or rule of equity, that as between two persons whose equitable interests are of precisely the same nature and quality, and in that respect precisely equal, the possession of the deeds gives the better equity. And, applying this rule to the present case, it appears to me that the equitable interests of the two parties being in their nature and quality of equal worth, the Defendant having possession of the deeds has the better equity; and that there is, therefore, in this case no room for the application of the maxim *qui prior*

1854.  
  
*Rice*  
 and Others  
 v.  
*Rice*  
 and Others.

(a) Page 81.

(b) 3 Sugd. Vend. 218.

(c) 10 Ves. 271.

1854.  
 RICE  
 and Others  
 v.  
 RICE  
 and Others.


*est tempore potior est jure*, which is only applicable where the equities of the two parties are in all other respects equal. I feel all the more confidence in arriving at this conclusion, inasmuch as it is in accordance with the opinion expressed by Lord *St. Leonards* in his work on Vendors and Purchasers. And I have no doubt that in *Mackreth v. Symmons*, if the equitable mortgagee had, in addition to his contract for a mortgage, obtained the title deeds from his mortgagor, Lord *Eldon* would have decided in his favour.

I must however guard against the supposition that I mean to express an opinion that the possession of title deeds will in all cases and under all circumstances give the better equity. The deeds may be in the possession of a party in such a manner and under such circumstances as that such possession will confer no advantage whatever. For example, in *Allen v. Knight* (a) (affirmed by the Lord Chancellor and reported on appeal in 11 Jur. (b)) the deeds had been delivered to the first equitable mortgagee, and by some unexplained means they had got back into the possession of the mortgagor, who delivered them to a subsequent equitable mortgagee. It was insisted by the latter that it must be presumed that it was by the fault or neglect of the first mortgagee that the deeds had got out of his possession, or that at all events the Court should direct an enquiry as to the circumstances. But the Court held that the onus lay on the second mortgagee of proving such alleged fault or neglect of the first mortgagee; and as he had failed to prove it, the Court could not presume it, nor direct an enquiry on the subject; and decreed in favour of the first mortgagee. I think it may be clearly inferred from this

(a) 5 Hare, 272.

(b) Page 527.

case that if the first mortgagee had never had the deeds delivered to him, or if it had been proved that the deeds had got back to the mortgagor through his fault or neglect, the decision would have been in favour of the second mortgagee who had the deeds. So the deeds may have come into the hands of a subsequent equitable mortgagee by means of an act committed by another person which constituted a breach of an express trust as against the person having the prior equitable interest. In such a case it would be contrary to the principles of a Court of Equity to allow the subsequent mortgagee to avail himself of the injury which had been thus done to the party having the prior equitable estate or interest.

1854.  
  
 RICE  
 and Others  
 v.  
 RICE  
 and Others.

Indeed it appears to me that in all cases of contest between persons having equitable interests, the conduct of the parties and all the circumstances must be taken into consideration, in order to determine which has the better equity. And if we take that course in the present case, everything seems in favour of the Defendant the equitable mortgagee. The vendors when they sold the estate chose to leave part of the purchase money unpaid, and yet executed and delivered to the purchaser a conveyance, by which they declared in the most solemn and deliberate manner, both in the body and by a receipt indorsed, that the whole purchase money had been duly paid. They might still have required that the title deeds should remain in their custody, with a memorandum by way of equitable mortgage as a security for the unpaid purchase money, and if they had done so they would have been secure against any subsequent equitable incumbrance; but that they did not choose to do, and the deeds were delivered to the purchaser. Thus they voluntarily armed the purchaser with the means of dealing with the estate as the absolute legal and equitable owner,

1854.  
 Rice  
 and Others  
 v.  
 Rice  
 and Others.

free from every shadow of incumbrance or adverse equity. In truth it cannot be said that the purchaser in mortgaging the estate by the deposit of the deeds has done the vendors any wrong, for he has only done that which the vendors authorized and enabled him to do. The Defendant, who afterwards took a mortgage, was in effect invited and encouraged by the vendors to rely on the purchaser's title. They had in effect by their acts assured the mortgagee that, as far as they (the vendors) were concerned, the mortgagor had an absolute indefeasible title both at law and in equity.

The mortgagee was guilty of no negligence; he was perfectly justified in trusting to the security of the equitable mortgage by deposit of the deeds, without the slightest obligation to go and inquire of the vendors whether they had received all their purchase money, when they had already given their solemn assurance in writing that they had received every shilling of it, and had conveyed the estate and delivered over the deeds; and I do not think that the fact of the conveyance bearing date only the day before the mortgage imposed on him any such obligation. The Defendant omitted nothing that was necessary to constitute a complete and effectual equitable mortgage; and although the mortgage was taken, not for money actually advanced at the time, but for an antecedent debt, the forbearance of that debt constitutes a full and sufficient valuable consideration.

Upon a comparison then of the conduct of the two parties and a consideration of all the circumstances of the case, and especially the fact of the possession of the deeds, which the mortgagee acquired with perfect *bona fides*, and without any wrong done to the vendors, I am

of opinion that the equity of the mortgagee is far better than that of the vendor, and ought to prevail.

1854.  
  
 RICE  
 and Others  
 v.  
 RICE  
 and Others.

I may in conclusion venture to make the suggestion, that the point now under consideration is often put by text writers in a form calculated to mislead, when it is propounded as a question whether the vendor, in respect of his lien for unpaid purchase money, or an equitable mortgagee, ought to be preferred; or when an opinion is expressed that the one or the other has the better equity. If I am right in my view of the matter, neither the one nor the other has *necessarily and under all circumstances* the better equity. Their equitable interests, abstractedly considered, are of equal value in respect of their nature and quality; but whether their equities are in other respects equal, or whether the one or the other has acquired the better equity, must depend upon all the circumstances of each particular case, and especially the conduct of the respective parties. And among the circumstances which may give to the one the better equity, the possession of the title deeds is a very material one. But if after a close examination of all these matters, there appears nothing to give to the one a better equity than the other, then, and then only, resort must be had to the maxim *qui prior est tempore potior est jure*, and priority of time then gives the better equity.



1854 :  
17th January.

*Statutes.  
Apportion-  
ment.*

The stat. 4 & 5 Will. 4, c. 22, requires, in order to exclude apportionment, either an express direction that there shall be none, or language so express in the terms of gift, that apportionment is clearly impossible, consistently with it. Inference from the whole tenor and context of the will, is not sufficient to exclude the operation of the statute.

TYRRELL v. CLARK.

**GEORGE SANDERS TURNER**, the testator in the cause, by his will, dated the 17th of November, 1837, after appointing his wife *Mary Turner*, since deceased, executrix, and the Plaintiffs *William Tyrrell* and *James Bishop* executors thereof, and bequeathing to the Plaintiffs a legacy of 100*l.* each, and after a specific bequest to his wife of certain furniture and chattels, gave and directed as follows:—

“And, subject to the payment of the two legacies of 100*l.* each to my executors and my funeral and testamentary expenses, I give and bequeath unto my said wife the dividends which shall or may happen to become due and payable in her lifetime of all stocks or funds which shall be standing in my own name in the books of the Governor and Company of the Bank of England at the time of my decease, for her own use and benefit: I also give and bequeath unto my said wife for her own use and benefit the dividends which shall or may happen to become due and payable in her lifetime of 5,000*l.* three pounds per centum consolidated bank annuities, 4,000*l.* three pounds ten shillings per centum reduced bank annuities, 1,732*l.* 10*s.* new three pounds ten shillings per centum bank annuities, and 500*l.* three pounds per centum reduced bank annuities, now standing in the books of the Governor and Company of the Bank of England in the names of *Mary Turner*, *Samuel Driver* and *George Sanders Turner* (meaning me the said testator), subject to the life interest of the said *Samuel Driver* therein, upon whose decease the said last-de-

scribed stocks will, under and by virtue of the settlement made previously to the marriage of the said *Samuel Driver* with *Mary* his late wife (who was my sister), devolve to me, my executors, administrators or assigns: And I give and bequeath, *after the decease of my said wife, all subsequent dividends* payable on 1,000*l.*, part of the said 4,000*l.* three pounds ten shillings per centum reduced bank annuities, unto the churchwardens of the parish of St. John of Wapping, in the county of Middlesex, for the time being, for the purpose of purchasing bread and coals, to be given away by the said churchwardens to such poor inhabitants of the said parish as they shall think fit on the 21st day of December in every year for ever: And I give and bequeath, *after the decease of my said wife, all subsequent dividends* payable on 2,000*l.* three pounds ten shillings per centum reduced bank annuities unto the treasurer for the time being of the charity schools of the said parish of St. John of Wapping, to be applied towards carrying on the benevolent designs of the said charity schools for ever: And I give and bequeath, after the decease of my said wife, unto *William Dawe*, the son of my late sister *Mary Driver*, 1,000*l.*, the remaining part of the said 4,000*l.* three pounds ten shillings reduced bank annuities, and *all subsequent dividends payable* thereon, for his own use and benefit."

The testator then gave and bequeathed to the said *William Dawe*, after the decease of his said wife, 200*l.*, part of the said sum of 1,732*l.* 10*s.* new three pounds ten shillings per centum bank annuities, and all subsequent dividends payable thereon, for his own use and benefit, with certain trusts, not material to be stated, as to both of the said sums of 1000*l.* three pounds ten shillings per centum bank annuities and 200*l.* new three pounds ten

1854.  
  
 TYRRELL  
 v.  
 CLARK.

1854.  
~  
TYRRELL  
v.  
CLARK.

shillings per centum bank annuities: And the said testator gave and bequeathed, *after the death of his said wife*, unto the treasurer for the time being of the Tower Hamlets' Dispensary 600*l.*, other part of the said 1,732*l.* 10*s.* new three pounds ten shillings per centum bank annuities, *and all subsequent dividends payable thereon*, to be applied towards carrying on the benevolent purposes of the said dispensary: And he gave and bequeathed, *after the decease of his said wife*, unto the treasurer for the time being of the Middlesex Society for educating Poor Children in the Protestant Religion, 500*l.*, further part of the said 1,732*l.* 10*s.* new three pounds ten shillings per centum bank annuities, *and all subsequent dividends payable thereon*, to be applied for the sole purposes of that society or charity: And he gave and bequeathed, *after the decease of his said wife*, unto the treasurer for the time being of the Philanthropic Society at Mile End 100*l.*, further part of the said 1,732*l.* 10*s.* new three pounds ten shillings per centum bank annuities, *and all subsequent dividends payable thereon*, for the uses and purposes of that society: And he gave and bequeathed, *after the decease of his said wife*, unto the treasurer for the time being of the Infant Orphan Asylum, therein described, 332*l.* 10*s.*, the remaining part of the said 1,732*l.* 10*s.* new three pounds ten shillings per centum bank annuities, *and all subsequent dividends payable thereon*, to be applied for the charitable designs of the said institution: And the said will also contained a like disposition in the like terms of the before-mentioned sum of 500*l.* bank three pounds per centum reduced annuities, *and the subsequent dividends payable thereon*, in different shares and proportions, amongst certain other charitable institutions. And after certain other specific and pecuniary bequests, not material to be stated, the said testator gave and bequeathed, *after*

*the decease of his said wife*, unto the Defendant *Edith Clark*, the sister of his said wife, the dividends which should or might happen to become due and payable in the lifetime of the said *Edith Clark*, after his said wife's death, on 6,000*l.* three pounds per centum consolidated bank annuities, part of such stock or funds, which should or might be standing in his own name in the books of the Governor and Company of the Bank of England at the time of his decease, for her own use and benefit. And as to all and singular the rest, residue and remainder of his estate and effects whatsoever, including the principal of the stocks or funds, the dividends of which he had given to or for the benefit of his said wife during her life, and to *Edith Clark* her sister after her decease, which he had not specifically bequeathed after the decease of his said wife, he gave and bequeathed the same and every part thereof unto his trustees, upon trust in fourths for certain persons. And the will contained a power to appoint new trustees. And it was thereby declared that every trustee should be entitled to retain out of the trust monies all reasonable expenses which he should be put unto in the execution of the trusts.

1854.  
  
 TYRRELL  
 v.  
 CLARK.

The testator died on the 3rd day of August, 1839, without having revoked or altered his will, leaving *Mary Turner*, his widow, and *William James* and others, his residuary legatees, surviving.

The only substantial question in the cause was whether there ought to be between *Mary Turner's* representatives and the residuary legatees an apportionment of the dividends of the stock which *Mary Turner* took for life for the period between her death and the preceding half-yearly day of payment of the dividends.

1854.  
TYRRELL  
v.  
CLARK.

Mr. *Baily* and Mr. *F. S. Williams*, for the Plaintiffs, stated the case for the opinion of the Court.

Mr. *Lee* and Mr. *J. V. Prior*, for *John Clark*, one of the residuary legatees.

The question is whether the language of the testator does not amount to an *express stipulation* within the meaning of the Apportionment Act, 4 & 5 Will. 4, c. 22. The third section of the act is as follows:—"Provided always, and be it enacted, that the provisions herein contained shall not apply to any case in which it shall be expressly stipulated that no apportionment shall take place, or to annual sums made payable on policies of assurance of any description." The words of this will cannot be satisfied without apportionment. The testator speaks throughout of *subsequent dividends*, plainly pointing at the death of his wife as a specific period, after which all that accrues is to be enjoyed by the remainderman. It is not a mere gift in remainder, but an expressed intention that all that falls due after a given time shall go to the persons who are to take an interest at that time.


Mr. *Bagshawe*, for the parties interested in the residue, followed the same line of argument.

Mr. *Cole*, for other parties.

Mr. *C. Hall*, for *Edith Clark*, the executrix of the testator's widow.

The testator has not *expressly stipulated* that there shall be no apportionment, and he must do so to exclude the operation of the act.

It is said that from the language of this will, you are to collect an intention to exclude apportionment; but even if it were enough to be able to infer an intention, there is nothing in this will to justify it. The gift of subsequent dividends, on which so much stress is laid, is really no more than an ordinary gift of the remainder over after a life estate. Besides, there is in the will a very general power to vary securities, to lay out the trust monies, among other securities, on mortgage. Now, suppose the trust monies invested on mortgage. It is perfectly clear that then there must have been apportionment. Now, there being in the trustees that option, can the testator have intended that the rights of the widow should depend on the conduct of the trustees; that in one event she should have apportionment, and in another, by reason of a caprice of the trustees, she should not? However, whether any such intention as that contended for is to be inferred or not, inference is not enough; there must be an actual expressed exclusion, or a gift so worded that the conclusion against apportionment is one of irresistible implication, not mere inference.

1854.  
  
 TYRRELL  
 v.  
 CLARK.

Mr. *Lee*, in reply.

It is said there must be an express direction that apportionment shall not take place. That cannot be so. Suppose the language were such as actually to give the particular fund otherwise subject to apportionment. Could it be said that then there would be apportionment, because there is no express direction that apportionment is not to take place?

Then I say, in effect, the testator has described the fund subject to apportionment, and has given it: so that apportionment is by the terms of the will clearly and positively excluded.

1854.

TYRRELL

v.  
CLARK.

## The VICE-CHANCELLOR :

The decision of this question of apportionment depends on the construction of the language of the statute. Before the statute, if there was a gift of the dividends of stock for life, with a remainder over, if a question arose whether there should be apportionment, whatever were the terms, no apportionment was ever made, unless the testator *expressly* directed it. In other words, that would before the act have taken effect under any will, which is in words directed in this will. But the act says there shall always be apportionment, except in the case excepted by the third clause of the act. [The Vice-Chancellor referred to the clause set out in p. 90.] The question is, what is the meaning of "expressly stipulating." It is insisted, that it means, where you can infer from the whole context of the will that the testator did not intend apportionment. I think the statute does not mean that; it means that there must be in express terms that which amounts to a stipulation that no apportionment shall take place.

Then it was also urged by Mr. *Hall*, that even if the construction of the statute was different, there is here no sufficient indication of intention. Now, without going into that, it appears to me that if the legislature had meant that this Court should, on the construction of a will, come to a conclusion whether the testator used terms which on the whole indicate an intention to exclude apportionment, the clause of exception would have been very differently worded. The legislature has required an *express stipulation*. It appears to me that that language requires something very different from inference to be collected from the general terms of the will. No doubt there may be cases where, though the testator has not inserted in so many words a stipulation that appor-

tionment shall not take place, yet he has used terms of gift, so clear, so express, as necessarily to exclude apportionment. That would amount to an express stipulation. But that is very different from saying, that where a testator has, instead of an express stipulation, used language such as is found in this will, the Court is to infer that he intended to exclude the operation of the statute. I am of opinion that this is a case for apportionment.

1854.  
TYRRELL  
v.  
CLARK.

NOTTLEY v. PALMER.

THE bill in this case was filed for the administration of the estate of *James Thomas Benedictus Nottley*, and on the construction of his will a question of election arose, which was now argued.

The testator gave certain real estates, which he described, to trustees upon trust by and out of the rents and issues and profits thereof (subject to certain charges) to pay to his wife during widowhood, without power of anticipation, an annuity of 200*l.* a year, to be reduced on her second marriage; and he declared that the said annuities, and the other annuities by him thereafter provided for her, should and were by him intended to be instead and in lieu and satisfaction of all dower and thirds at the common law, or otherwise which she would or might have been entitled to in default of that his will. Subject to these annuities, he gave the property charged, on trust for his son *George* for life, with remainders to his children.

Jan. 28th.  
Election.  
Dower.  
Freebench.

A testator gave annuities to his widow, charged on land, certain freehold parts of which he had no power to devise, and as to certain copyhold parts of which it was contended that it did not pass by his will. He declared that such annuities were in satisfaction of "all dower and thirds at the common law or otherwise, which she would or might have been entitled to in default of his will." Held,

that the widow was put to her election, as well as to the freehold lands which he had no power to devise, as to the freebench out of the copyhold.



1854.  
NUTTLEY  
v.  
PALMER.

He gave other portions of real estate upon similar trusts, charged with an annuity of 200*l.* a year, reducible in like manner, to the widow, and subject thereto for his son *Marwood Nuttley* and his children; and he gave his residuary estate to five of his younger children. Of some of the property purported to be devised by him the testator was only tenant in tail; and some of it was copyhold, which it was contended did not pass by the will.

Mr. *Lee* and Mr. *Hanson* were for the Plaintiffs, the five younger children.

Mr. *Swanston* and Mr. *F. S. Williams*, for the widow, contended that the widow could only be put to her election in respect of property which not only the testator had power to devise, but which he intended to devise. Therefore they said she was not put to her election as to the entailed lands which the testator had no power to devise, nor to the copyhold, which they argued he did not intend to devise. But even admitting that she was put to her election generally of all the estates of which she might have had *dower*, still that would not put her to her election as to her freebench in the copyhold, for freebench is quite distinct from copyhold. They referred to 1 *Roper, Husband and Wife* (a).

Mr. *C. Hall*, for *Marwood Nuttley*, and Mr. *Glasse* and Mr. *Rogers*, for *George Nuttley*, were not called upon.

Mr. *Bacon* and Mr. *Brooksbank* appeared for the trustees.

(a) Page 482.

1854.

NOTTLEY  
v.  
PALMER.

The VICE-CHANCELLOR :

I have no doubt on this point. The testator by his will makes the following provisions:—he disposes of certain estates, one for the benefit of his son *George* and his children, and the other for the benefit of his son *Marwood* and his children. He gives to his widow certain specific bequests, about which no question arises; and then he gives her two annuities, one charged on the estates devised to *George* and his children, the other on those devised to *Marwood* and his children, and as to these there is this declaration. [His Honor referred to the declaration set out in p. 93.]

Now it is clear that whatever comes within this description is that as to which she is put to her election. [His Honor then referred to the words “dower,” &c.]

Now suppose there had been no will, she would have had dower out of all the testator's freehold estates of which he was tenant in fee; of all the freehold estates of which he was tenant in tail; and she would have had dower or freebench out of all the testator's copyhold estate according to the custom. It is true that as to some of these estates, viz. as to those of which he was tenant in tail, he had no power to dispose of them. It may be that he has made an attempt to dispose of them so as to put the issue in tail to elect between their rights and the benefits they take under the will. But that is not the question here; and what he intended was this. He says in effect, “Whereas I am owner of certain estates, whether I am owner of them in fee or in tail, whether they pass by my will, or whether they go to the issue by force of the entail, I mean to make a provision for my

1854.  
  
NOTTLEY  
v.  
PALMER.

widow in satisfaction of her dower out of all those estates of which I am so owner." The words of the declaration are, I think, amply sufficient to put her to her election as to all the testator's estates. There is no ground for confining her election to lands which the testator had power to devise. As to the copyholds, the contention is that the words of the declaration are not large enough to include freebench; but it appears to me that they are; and that they extend as well to freebench, as to dower out of freehold. The word freebench is not used, it is true; but the words used are "all dower and thirds at common law *or otherwise*." Those words might indeed be intended to apply to customary freeholds, but they will also extend to that species of customary dower called freebench. Therefore I am of opinion that the widow is put to her election between her annuities and all her dower or freebench, both as to the freehold estates in fee or in tail, and as to the copyholds.

ROGERS v. HOOPER.

IN this case, in which was involved the establishment of a pedigree, two questions arose; the first, where certain Defendants having answered, and replication having been filed, other Defendants answer, what is the proper course to be adopted for putting the cause at issue as to the Defendants answering after replication? The second, whether, after a Plaintiff has elected in the regular course that the evidence in the cause shall be taken orally, the Court has power, on his application, to order the evidence generally, or at least the substantial part of it, to be taken by affidavit. The Plaintiff had amended and filed replication under a special order made in November, 1853, putting him to file replication within a given time.

A motion was made to withdraw replication, and for leave to file a new replication, and for an order that the affidavits made by certain witnesses might be read; and that numerous other witnesses might give evidence on affidavit. The motion extended to the appointment of a special examiner to take the evidence of certain specified witnesses in the country. The other facts material to be considered are referred to in the judgment.

Mr. C. P. Cooper and Mr. Greene, for the motion.

According to the present practice, only one replication can be filed, unless the Court otherwise orders. Unless therefore replication is withdrawn, and a fresh replication filed against all the Defendants, we cannot put the cause

1854:  
31st January.

*Practice.  
Replication.  
Evidence by  
Affidavit.  
Statutes.  
Chancery  
Amendment  
Act.*

Where, after replication filed, some Defendants answer, if publication can be enlarged so as to embrace both sets of Defendants, the course for putting the cause at issue as to the new Defendants is not necessarily to withdraw replication, but to obtain leave to file a further replication.

The 36th section of the Chancery Amendment Act, 15 & 16 Vict. c. 86, requires special reasons to be shown to the Court, affecting either particular witnesses, or particular facts.

1854.  
~  
ROGERS  
v.  
HOOPER.

at issue as against the Defendants who have answered since replication.


On the second point they relied on the 36th section of the 15 & 16 Vict. c. 86. The Court has power under that section to order the evidence of any witnesses to be taken on affidavit, notwithstanding the Plaintiff or Defendant may have elected to take the evidence orally. Here it will be most convenient and economical to take the evidence by affidavit, as most of the witnesses live in the country; and if the Defendant desires it, he can cross-examine any of them orally.

Mr. *Baily* and Mr. *Boyle*, for the Defendants who had answered before replication.

The Plaintiff has replied under an order which required him to do so within a given time. He has elected to proceed subject to that condition, and cannot now ask that the Defendants should be further delayed.

As to the second point. The witnesses who are to be examined will be called to prove births and deaths, and other links in the chain, to establish pedigree. Now as to the mere proof of certificates, the certificates prove themselves. As to the proof of identity, that it is most material should be given orally, particularly as most of the witnesses are old and in humble life; and it is well known that from such persons evidence of the loosest kind may be obtained on affidavit. The 36th section of the Chancery Amendment Act has no application; that relates only to affidavits by particular witnesses, or as to particular facts, and something special must be shown to call it into operation. Here the only thing special is, that the witnesses are old and have to prove identity,

which is a very special reason why they should give evidence in chief as well as on cross-examination orally.

1854.  
  
 ROGERS  
 v.  
 HOOPER.

Mr. *Clarke*, for the other Defendants who had answered since replication.

Mr. *C. P. Cooper*, in reply.

The VICE-CHANCELLOR :

On the first question, that of withdrawing the replication, the Plaintiff was by the order of November, 1853, ordered to amend his bill and to file replication within a certain time ; he chose to take the order with that condition. It appears that since replication was filed, other Defendants, who had not previously answered, have answered, and the replication only applies to the former Defendants. As to the Defendants who have recently answered, the cause is not at issue. Now, no doubt, there must be some mode by which, when Defendants have answered after a replication, and it is necessary to take issue as against those Defendants, the cause can be put at issue. One mode would be to withdraw the replication, and to file a fresh replication ; another, which comes clearly within the terms of the general orders, is, that notwithstanding the general direction that there shall be but one replication, that the Court should authorize more than one. If this course is adopted, there might be this objection : that whereas, with regard to the first replication, the time within which the evidence must be closed would expire at one period, the same time would, as regards the second replication, expire at a subsequent period, and that would of course cause great confusion ; for, as to the first set of Defendants, evidence could not be given after the first period, but as

1854.  
~  
ROGERS  
v.  
HOOPER.

against the others it might: so that some portion of the evidence could be used only against certain Defendants, while other portions might be used against all; but in this case no such difficulty as to time arises, as the Defendants do not object to enlarge the time for publication. The objection as to time to there being two replications does not therefore apply; and that difficulty being thus got over, it appears to me that the proper and convenient course will be for me to authorize the Plaintiff to file a further replication against the Defendants who have answered since the first.

Next, with regard to using affidavits. The motion addresses itself to two classes of affidavits: affidavits already made by certain witnesses, and affidavits to be made by persons who have not yet given evidence. First, as to future affidavits, I see no reason whatever for granting the application. The Plaintiff has elected that the evidence should be taken orally; that being so, what reason has he shown, having regard to the circumstances of the case, that that course should be abandoned, and affidavits filed. To do so, some special reason should be shown. None of the circumstances stated by the Plaintiff appear to me to afford any such reason, and that part of the motion must therefore be refused. There is more reason for reading the affidavits already filed, made, it seems, by elderly persons, if the necessity of using those affidavits were supported by showing a difficulty of oral examination, arising from great infirmity, or such reasons, that might afford a ground for using them; but the only difficulty suggested, namely, that of bringing these aged persons to town, is got over by the appointment of a special examiner, agreed upon by both parties. What reason is there as to those witnesses that their evidence in chief should not be taken orally, as well as their cross-examination? It being admitted that they are to be

cross-examined orally, how can any objection, on the ground of age or infirmity, be suggested as a reason why their examination in chief should be upon affidavit? [The Vice-Chancellor then referred to the 36th section of the act, and proceeded.] The interpretation that I put upon that section is, that there must be some special reasons applicable to particular witnesses, or some special reasons arising out of the nature or particular facts of the case to authorize the Court to act under that section. I think here there are no such special reasons. The only fact alleged as to the witnesses is, that they are elderly persons, which, as I have said, is not, I think, any special reason why they should not be examined orally in chief as well as on cross-examination. As to the facts on which they are to be examined, they appear to me to be of a nature peculiarly and specially requiring the examination to be oral. I may presume that most of these persons who are to be examined are in humble life, and they are to be called to prove circumstances to make out what must be admitted to be at least a very difficult claim. The same principle applies to all the other affidavits. I assume that the witnesses must come to London to be cross-examined. They must attend the examiner, and I see no special reason in their case why their examination in chief should not be oral as well as their cross-examination. For these reasons I must also refuse the application on this point.

1854.

ROGERS  
v.  
HOOPER.



1853:

Argued 10th,  
12th, 13th and  
14th Dec.Solicitor and  
Client.  
Surety.

*A.*, *B.* and *C.* entered into partnership as bankers; *C.* was to be the managing partner. *C.* and *E.* entered into a bond to *A.* and *B.* for the due performance of the articles of partnership by *C.* After a few years *A.* retired, and a new partnership was entered into between *B.* and *C.*, and *C.* and *E.* then gave a bond to *B.* to indemnify him not only for the due performance of the articles by *C.*, but against any loss which might occur in the management of the business.

The terms of the bond were very stringent. *B.* was a solicitor, and drew the bond, and sent it to *C.* and *E.* for their perusal, but gave no particular explanation of its effect: Held, that *B.* was not to be treated in the matter as the solicitor of *E.*, and that he was not bound to enter into any particular explanation of the tenor or effect of the bond.

Discussion of the principles of the law, as to the duty of a party taking an indemnity to the party indemnifying him as surety.

## SMALL v. CURRIE.

THIS was a bill to have a bond, dated the 20th August, 1842, delivered up, as being fraudulent and void as against one *Lipscombe*, or that it might be declared that the bond ought to be rectified and made conformable to a former bond given in 1833, and that the liability of *Lipscombe's* estate might be ascertained on that footing, &c.

The facts of the case were stated by the Court, as follows (a):—

The question raised in this case of *Small v. Currie* is a question whether a certain bond of indemnity given by the testator of the Plaintiff, to the Defendant Mr. *Currie* ought to be declared invalid by this Court or ought to be reformed.

The circumstances of the case are somewhat peculiar. In and previous to the year 1833, as well as subsequent to that time, Colonel *Jolliffe* was the owner of some property in or in the neighbourhood of *Peterfield*, had established some political interest in that borough, and had been returned to parliament for the borough. He

(a) To avoid repetition, it is necessary to state a portion of the judgment in this part of the report.

has been thought more convenient to insert this preliminary portion of the judgment in this part of the report.

had been employing as his agent in the borough a gentleman of the name of *Hector*, who it appears was a banker there, but a quarrel having taken place between Colonel *Jolliffe* and Mr. *Hector*, they severed. Mr. *Hector* became his political opponent, and I think on one if not on more subsequent occasions, but at any rate on the occasion of one election, succeeded in being elected against Colonel *Jolliffe*. There were two parties in the borough, Colonel *Jolliffe's* party, as it was called, and the party to which Mr. *Hector* then appertained. After the severance between Colonel *Jolliffe* and Mr. *Hector*, Colonel *Jolliffe* employed as his agent the Defendant Mr. *Currie*, a solicitor practising in *London*, and a member of a well known firm of solicitors practising in this and other Courts.

1853.  
  
 SMALL  
 v.  
 CURRIE.

There were living at *Peterfield* two persons whose names figure in this case, Mr. *Lipscombe*, who is the testator of the Plaintiff, who was a retired farmer, a person of some not inconsiderable property; the other a Mr. *Butterfield*, who was also a farmer, or had been a farmer; Mr. *Butterfield* had married a favourite niece of Mr. *Lipscombe*, who had no children of his own; Mr. *Butterfield* married the niece, who was treated by Mr. *Lipscombe* as his daughter, and Mr. *Lipscombe* seems to have regarded Mr. *Butterfield* very much in the light of his son-in-law, and was very much interested in his welfare and in promoting his interests in life. Both of these persons, Mr. *Lipscombe* and Mr. *Butterfield*, were strenuous partizans of the *Jolliffe* faction in the borough of *Peterfield*; and it seems that a suggestion was made in the early part of the year 1833, or about that time, that it would be a very expedient measure to establish an opposition bank at *Peterfield*, with a view of counteracting the banking influence of Mr. *Hector*, withdrawing of course, if possible, some of his customers, and also

1853.  
  
 SMALL  
 v.  
 CURRIE.

with a view of making advances to the electors of *Peterfield*, to obtain an influence over their votes.

This suggestion seems, if not to have originated with, at least to have been very strenuously supported by Mr. *Lipscombe*. Accordingly a bank was established in April, 1833, the partners in which were Colonel *Jolliffe*, Mr. *Currie* his agent, the *London* solicitor, and Mr. *Butterfield*. Articles of partnership, dated the 24th of April, 1833, were executed; by which the partnership was established for three years, upon the terms that Colonel *Jolliffe* and Mr. *Currie* were to share the profits in the proportions of two-thirds to Colonel *Jolliffe* and one-third to Mr. *Currie*, Mr. *Butterfield* having a salary of 250*l.* a year for managing the business, and that was the only emolument he was to derive from the concern. It was also stipulated that capital not exceeding 3,000*l.* should be brought in by Colonel *Jolliffe* and Mr. *Currie* in the same proportions, two-thirds by Colonel *Jolliffe* and one-third by Mr. *Currie*; and upon that occasion a bond of indemnity was given by Mr. *Butterfield* and Mr. *Lipscombe*, Mr. *Lipscombe* being the surety for Mr. *Butterfield*, for the purpose of guaranteeing to Colonel *Jolliffe* and Mr. *Currie* that Mr. *Butterfield* would duly observe the articles. Mr. *Butterfield* was to be the managing partner. The business went on, and instead of its being put an end to at the expiration of the three years for which it was originally founded by the articles of 1833, it went on without interruption until 1839, when new articles, dated the 23rd of February, 1839, were executed between the same parties, by which they agreed to continue the partnership for five years longer, from the 2nd of May, 1839, and substantially the articles were the same as those of 1833, the only material difference, if it can be called material, was, that instead of the 250*l.* a year, which by the former articles Mr. *Butterfield* was

to receive, he was by the articles of 1839 to receive 200*l.* a year. In other respects the provisions of the articles of 1839 were the same, if not verbatim, at least in substance, as those of 1833 as to the profits and as to the capital, and as to the management of the business. But upon this occasion there was no bond of indemnity, no guarantee required for the performance of the articles by Mr. *Butterfield*; probably the parties had found that Mr. *Butterfield* had continued the business, and had not violated the articles, and therefore they required no further bond of indemnity. In August, 1842, Colonel *Jolliffe* desired to retire from the partnership, and accordingly a deed of dissolution was executed on the 20th of August, 1842, by which the partnership was dissolved as to him, indeed dissolved as to all; but by a deed of the same date a new partnership was formed between Mr. *Currie* and Mr. *Butterfield* for five years: the effect being that Colonel *Jolliffe* was to retire and the business was to be continued by Mr. *Currie* and by Mr. *Butterfield* as partners.

1853.  
SMALL  
v.  
CURRIE.

By the articles of 1842 Mr. *Butterfield* was to have all the profits up to and not exceeding 300*l.* a year, and the surplus profits beyond 300*l.* a year were to be divided equally between Mr. *Currie* and Mr. *Butterfield*, and there was no stipulation at all about capital. These articles of 1842, as indeed might be expected, considering that Colonel *Jolliffe*, one of the efficient partners—one of the monied partners—was retiring: these articles, I say, of 1842, differed very materially from the articles of 1833 and 1839, and by a bond of the same date, of the 20th of August, 1842, which is the bond now in controversy, Mr. *Lipscombe* and Mr. *Butterfield* became bound to Mr. *Currie* for the purpose of indemnifying Mr. *Currie*: this bond to guarantee *Currie* not merely

1853.  
SMALL  
v.  
CURRIE.

for the due performance of the articles by *Butterfield*, but indemnifying *Currie* against all loss that might under any circumstances and from whatever cause arise in the course of the business. I ought to mention, also, that by the arrangement now made by the articles of 1842, all the debts, all the assets, all the liabilities, all the debts due to the concern, and all the debts due from the concern, were transferred to the new partnership, and by the bond of indemnity Mr. *Lipscombe*, as surety for Mr. *Butterfield*, and Mr. *Butterfield* as principal, indemnified *Currie* against all loss that might arise from the failure or insolvency or bankruptcy of any one of the debtors to the concern, which of course would include the debtors whose debts were transferred from the late partnership to the new.

The business went on from 1842, and according to the terms of the articles it would have expired in 1847. It was not put an end to, but was continued, and, as appears from the evidence, was continued for the purpose of winding up. It was dissolved on the 3rd of April, 1849, and shortly afterwards, in the month of July, 1849, a fiat in bankruptcy issued against Mr. *Butterfield*, and Mr. *Butterfield* absconded. In the meantime, in October, 1848, Mr. *Lipscombe* had died, having by his will appointed the present Plaintiff his executor.

These are the facts of the case, and the contention on the part of the executors of *Lipscombe*, the Plaintiff, is this: the bill insists that they are entitled to have the bond of the 20th of August, 1842, delivered up, as being fraudulent and void as against *Lipscombe*, or, in the alternative, that it may be declared that that bond ought to be rectified or reformed and made conformable to the former bond, which was given in 1833, and that the lia-

bility of *Lipscombe's* estate may be ascertained on that footing.

1853.  
SMALL  
v.  
CURRIE.

I should mention, that after the bankruptcy and absconding of Mr. *Butterfield*, Mr. *Currie* brought an action on the bond against the representatives of *Lipscombe*. The bill of course sought to restrain that action. I rather think no injunction was granted, but I believe the action was stopped.

Mr. *Giffard*. I see the injunction was granted, but that was long after.

The VICE-CHANCELLOR :

I dare say that may be, but nothing has been said about it.

Mr. *Elmsley*. It was the common injunction.

The VICE-CHANCELLOR :

However, there was no motion to dissolve. Matters have remained in *statu quo* either under the injunction or with the concurrence of the parties.

The *Solicitor-General* and Mr. *Giffard* now argued the case for the Plaintiff.

The Defendant *Currie* by his answer states that the bond on which he was suing was the same as the bond given by *Lipscombe*. He must therefore have believed so ; and therefore also it is improbable that he would have represented to *Lipscombe* otherwise than that the bond of 1842 was only a repetition of his original lia-

1853.  
SMALL  
v.  
CURRIE.

bility. No doubt then that was the representation made to *Lipscombe*. The partnership is admitted to have been entered into for the political purposes of the *Jolliffe* family. The result of this bond was, that *Currie* might allow all kinds of transactions to take place in the bank for the purposes of the *Jolliffes*, and be indemnified against them by *Lipscombe*.

Now *Currie*, as the solicitor who prepared the bond, cannot be permitted to derive such an advantage, unless he can show that he fully explained to *Lipscombe* the extent and nature of his obligation. *Currie* cannot show this. The documents were prepared in the office of Mr. *Currie*, with an omission of the names in the drafts, and the blanks were filled up by Mr. *Currie* himself. He was the only person who interfered in the matter. So that *Lipscombe* had not the advice even of the firm, still less of any separate solicitor of his own. [The learned counsel referred to several portions of the documentary evidence, the result of which is stated in the judgment.] At the time of the formation of the bank it was insolvent; no capital was ever brought in, and *Lipscombe* was never informed of that fact. This we shall prove. [In support of this allegation, the learned counsel referred to several of the affidavits, which it is unnecessary to set out, as the general result of all the evidence is stated in the judgment. The object was further to show that *Butterfield* knew nothing about banking, and that *Howes*, an experienced banking clerk, was employed to teach him, and that in fact the bank was established purely for political and electioneering purposes.]

You are asked to believe that *Lipscombe* intended to be answerable for all the expenditure for the *Jolliffes'* interests, *Butterfield* being a man of straw, and *Currie*, who was the man really benefited, being wholly indem-

nified. [They referred to *Newman v. Milner* (a), and read a portion of the evidence, to show that in 1842 the bank was utterly insolvent.] The documents purporting to bind *Lipscombe* were all prepared by *Currie*, but he never explained the state of the affairs of the bank to *Lipscombe*: he did not disclose to him that he himself looked to *Jolliffe* to indemnify him. *Currie* was the solicitor of all the parties, including *Lipscombe*, and he took a security from him: he ought to have put him in full possession of all the knowledge necessary to show him his exact position. [They cited on this point Lord *Elton's* judgment in 1 Dow. (b) and *Squire v. Whitton* (c).]

1853.  
SMALL  
v.  
CURRIE.

Again, *Currie* did not wind up the concern at the time when he ought, under the articles of partnership, *Watson v. Alcock* (d), and that released the bond. They cited also Lord *Loughborough's* observations in *Newman v. Payne* (e) and *Gibson v. Jeyes* (f). To sum up, then, the substance of the argument is this. Even if there had been no relation between the parties except *Lipscombe* being a surety, *Currie* ought to have explained all the circumstances to him, and ought to have closed the business according to the articles. But, beyond that, as solicitor of *Lipscombe*, he ought to have advised him as if he had been his client, and the dealing had been with a stranger.

Mr. *Elmsley* and Mr. *Burden* for the Defendant *Currie*.

In 1825, *Hector*, the solicitor of *Jolliffe* was discharged; thenceforth he opposed the *Jolliffe* family. It became then necessary that *Jolliffe* should establish a

(a) 2 Ves. jun. 483.

(b) Page 294.

(c) 1 H. L. Cas. 333.

(d) 17 Jurist, 586.

(e) 2 Ves. jun. 199.

(f) 6 Ves. 266.



1853.  
  
 SMALL  
 v.  
 CURRIE.

bank, and thus the partnership of 1833 was formed. Mr. *Currie* could have had no personal interest in establishing the bank, but to *Butterfield* it was a matter of personal interest, and *Butterfield* had married *Lipscombe's* niece; so that *Lipscombe* had an interest to aid his pecuniary welfare. [They read passages from the answer (agreed to be treated as an affidavit) and from the evidence, to show that in 1842 *Currie* had ceased to have any interest in the bank being carried on. They referred also to the articles of partnership, to show how completely *Currie's* position was altered, and to the bond itself, to show that on the face of it *Lipscombe* had full information of the position of *Currie*.]

There is no proof of any connection between *Currie* and *Lipscombe*, except that which is stated in *Currie's* answer, that *Currie* became a partner at the instance of *Lipscombe* and *Butterfield*. There is no proof that *Currie* was the solicitor, or in any sense the confidential adviser of *Lipscombe*. *Currie* denies it, and there is no proof against his answer.

The doctrine relied on, as between solicitor and client, has therefore no application.

As to *Gibson v. Jeyes*, it proceeds on the relation between the parties; but that relation does not exist here. [The learned counsel commented on the two answers of *Currie*, and read passages to reconcile the statements about the similarity of the two bonds.]

The bond sought to be set aside, when prepared, was sent down to *Butterfield* and *Lipscombe* simply, and they executed it, without any intervention, advice or interference at all by *Currie*.

Then, as to the alleged release of the bond, by the carrying on of the business. How does that affect the liability of *Lipscombe*, who rendered himself liable during the whole continuance of the partnership.

1853.  
SMALL  
v.  
CURRIE.

As to the alleged insolvency of the bank in 1842, there is no evidence to show that, in 1842, *Currie* knew of such insolvency, except by the payment to *Jolliffe* (a), and that *Lipscombe* knew as well as *Currie*.

As to the relation between parties assured and the surety, they cited *Stone v. Compton* (b).

The principle on this point is, that mere silence on the part of the party assured, does not release the surety. There must be actual misrepresentation, and here there was none, nor is any even alleged.

The *Solicitor General*, in reply.

The VICE-CHANCELLOR took time to consider, and on the 30th January, 1854, delivered the following judgment:—

14 Dec.  
Judgment.

The first point taken by the plaintiff's counsel, is founded on the duty which a solicitor owes to his client.

It is insisted that *Currie* was the solicitor for *Lipscombe* in the transaction, and that it was the duty of *Currie*, as *Lipscombe's* solicitor, to have carefully explained to his client not only the tenor and effect of the bond, but the circumstances and condition of the partnership business at that time, its assets and liabilities

(a) See post, p. 120.

(b) 5 Bing. N. C. 152.

1853.  
SMALL  
v.  
CURRIE.

and the capital therein, and whether any and which of the debts owing to it were bad or doubtful. And inasmuch as no such information or explanation was given, and the provisions of the bond were of a very unusual and onerous description, therefore the transaction cannot be supported as between solicitor and client.

This argument rests entirely on the assumption that *Currie* was *Lipscombe's* solicitor. Is this the fact?

It is clear that he was not *Lipscombe's* solicitor in any other matter; he had never been employed by or acted for him. But it is said, that when he undertook to prepare the bond on behalf of *Lipscombe*, he became his solicitor.

Did he undertake to prepare it on behalf of *Lipscombe*? I see no ground for this assumption. He prepared it on his own behalf only, as being the party to be indemnified, and sent the draft to *Butterfield* for his own and *Lipscombe's* approval. There is no ground for supposing that either of them had the least notion that *Currie* undertook to prepare the bond on their or either of their behalf. Each knew that the bond, of which *Currie* sent them the draft, was what he required of them as the condition of his continuing a partner with *Butterfield*, not what he as their solicitor advised them that it was for their benefit to execute. Each or either of them might, if he thought fit, have submitted the draft to his own solicitor; and his choosing to abstain from so doing could not have the effect of constituting *Currie* his solicitor in the transaction. Suppose that *Currie*, instead of being a solicitor, had been a merchant or banker, and had caused the bond to be prepared by his own solicitor, and had transmitted the draft thus prepared to *Butter-*

*field*, for the approval of himself and *Lipscombe*, and that from a wish of concealing the matter from his family, or for any other reason, *Lipscombe* had thought fit to examine and approve it himself, without consulting his own solicitor, would that have made the solicitor by whom the bond was prepared the solicitor of *Lipscombe* in the transaction? If not, how can it make any difference that *Currie*, being himself a solicitor, prepared the bond without requiring the assistance of any other solicitor? If *Lipscombe* or *Butterfield* had given the slightest intimation to *Currie* that he considered *Currie* to be acting as his solicitor in the preparation of the bond, I have no doubt he would without hesitation have declined the office. The expense of preparing the bond was charged by *Currie* and his partners to the banking firm as part of the partnership liabilities, and not to *Lipscombe*. I am persuaded, that none of the three parties concerned entertained the least notion that *Currie* was acting as the solicitor of any one but himself.

Being of opinion that *Currie* did not act as the solicitor of *Lipscombe* in the transaction, it is unnecessary to consider what would have been the effect if such had been the fact.

The second point taken by the Plaintiff's counsel is founded on the duty which a person taking an indemnity owes to the surety or person by whom such indemnity is to be given.

It is insisted that the duty of *Currie* towards *Lipscombe*, as surety, required that he should give him full information and explanation on certain matters; and that *Currie's* omission to give such information and ex-

1853.  
SMALL  
v.  
CURRIE.

1853.



SMALL

v.

CURRIE.

planation is a ground for this Court to interfere to prevent him from enforcing his legal rights under the bond.

The first matter upon which it is insisted that *Currie* should have volunteered to give such information or explanation is the effect of the bond. I am not aware of any principle or any authority which imposes upon a person to whom another is about give a bond of indemnity as surety any special obligation, without having been asked so to do, to give particular explanations to the surety as to the meaning or effect of such bond, any more than a person who is taking from another any other species of deed or instrument which is to enure to the benefit of the person taking it, is under such obligation. If, indeed, the person taking the indemnity does, either by the frame of the instrument or by any representations made to the surety, or in any other manner, mislead the surety as to the effect of it, or occasion his misapprehending it, or takes advantage of his ignorance or distress, or induces him to execute the instrument under circumstances by which he is deprived of the means and opportunity of having legal advice and assistance, or if he knows or has reason to believe that the surety misapprehends the nature or effect of the instrument, and allows him to execute it without removing such misapprehension by sufficient explanation, in any such cases no doubt a Court of Equity would interfere to prevent any advantage being taken of a bond of indemnity so procured. And so it would in the case of any other species of instrument so procured. But if none of these circumstances occur, if the party to whom the indemnity is to be given, having prepared or caused to be prepared the instrument which he requires in clear and intelligible terms, transmits the draft to the intended surety for his approval, so that he has the full opportunity not only of

duly considering it himself uninfluenced by the representations or even by the presence of the other, but of procuring the advice and assistance of his own solicitor, I know not by what rule or principle of justice or equity his omission to enter into a particular explanation of the terms or tenor or effect of the proposed instrument is to have the effect of rendering it void.

1853.  
SMALL  
v.  
CURRIE.

Now what are the facts of the present case? *Currie*, having prepared the draft articles of partnership and the draft bond in *London*, on his own behalf and in the form which he required, sent them to *Butterfield*, at *Petersfield*, where both he and *Lipscombe* resided, for the approval of them both. I do not see what course he could have adopted which would have left either of them more entirely free and unfettered to exercise his own judgment as to the propriety or expediency of adopting or objecting to the bond of indemnity or any of its terms and provisions, or to call in the assistance and advice of any legal or other adviser. The terms and provisions of the bond, however stringent, were clear and unambiguous. The bond refers to and shortly recites the articles of 1842, the draft of which accompanied the draft bond, and there is no reason to doubt that *Lipscombe* had full access to and inspection of those articles. In fact, he attested *Butterfield's* execution of the articles; and although no doubt the mere attesting the execution of an instrument does not give the attesting witness a knowledge of its contents, it is evident that *Lipscombe* was not a mere attesting witness. There is no ground for regarding *Lipscombe* as having been deficient in intelligence or experience, or illiterate and uneducated, or under any pecuniary or other pressure. There is no suggestion that he was under the influence of *Currie*, or of any representations made by him; indeed there is

1853.  
SMALL  
v.  
CURRIE.

nothing to lead to the supposition that any communication whatever, written or verbal, passed between *Currie* and *Lipscombe* on the subject of the terms or effect of the bond. *Lipscombe's* own solicitor resided near him; and certainly it was not through any fault or neglect of *Currie* that *Lipscombe* did not choose to consult that solicitor; indeed, for any thing that *Currie* appears to have known to the contrary, that step may have been actually taken. What ground is there for supposing that *Currie* had any reason whatever to believe or suspect that *Lipscombe* was under any misapprehension as to the terms and provisions or effect of the bond? But further, what ground is there for supposing that *Lipscombe* did not perfectly comprehend it? *Parsons*, indeed, the intimate and confidential friend of *Lipscombe*, and the witness attesting the execution of the bond, in his affidavit for the Plaintiffs, sworn on 13th June, 1853, says he verily believes that *Lipscombe* did not know to what extent it bound him, and that, had he known that there was any amount of bad debts then due to the concern, and that he virtually guaranteed that all the debtors of the bank should pay their debts, he would have never signed it. But in his affidavit for the Defendant, sworn on 30th June, 1853, he says, "I am satisfied, from the conversations I have from time to time had with *Lipscombe*, that he well understood his liabilities under the bond." These two statements appear at first sight to contradict each other. If there be a real contradiction between them, all that can be said is that then they afford no evidence one way or the other. But upon a close examination of the language of the former affidavit, I think it will appear that there is no direct and positive contradiction of the latter. *Parsons* does not say he believes that *Lipscombe* did not understand the effect of the bond or his liabilities under it, but having just before said that no

solicitor was called in to explain the "*effect of the bond*," he adds the passage in question, in which he changes the language, viz. that he believes *Lipscombe* "did not *know to what extent* it bound him," and that, had he *known that there was any amount of bad debts then due to the concern*, and that he virtually guaranteed that all the debtors should pay their debts, he would not have signed it. This does not express any belief that *Lipscombe* did not understand the *effect of the bond*. If this had been intended, why not say it in so many words? Why change the language, and, although in the passage immediately preceding he was speaking in express terms of "the *effect of the bond*," proceed to express a belief, not that he did not understand its effect, but that he did not *know* the *extent* to which it bound him. Indeed, those latter words in themselves properly signify, not the *meaning or effect* of the bond, or the *nature* of the liability thereunder, but the *pecuniary amount* for which he became responsible, which of course he did not and could not know: that is their proper meaning, even standing alone; still more ought that meaning to be attributed to them when standing in contrast to the sentence immediately preceding, which speaks expressly of "the effect of the bond." And as to the last passage in the affidavit, it appears to me only to express a belief that *Lipscombe* would not have signed the bond if he had known two things in conjunction, viz. the fact that some of the debts were then bad, in conjunction with the fact that he guaranteed *all* the debts.

But whatever effect is to be given to the two affidavits of *Parsons*, there is no ground whatever for supposing that *Lipscombe* did not perfectly understand the meaning and effect of the bond. Indeed, his careful concealment of it from his friends, and even from his own wife, ap-

1853.

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SMALL

v.

CURRIE.



1853.  
SMALL  
v.  
CURRIE.

pears to me to afford no slight evidence that he perfectly understood the full meaning and effect of the bond; for if, as the Plaintiffs contend, he believed he was only guaranteeing the faithful observance of the articles by *Butterfield*, why should he be so anxious to conceal it?

Another matter upon which it is insisted that *Currie* ought to have given information to *Lipscombe*, is that some of the debts then due to the bank and transferred to the new partnership were bad or doubtful.

Now, I have no hesitation in stating it as my clear opinion, that a creditor taking from a surety a bond to indemnify him against the bankruptcy or insolvency of his debtor, is bound to disclose, voluntarily and without waiting to be asked, any facts within his knowledge material for the surety to be acquainted with relating to the pecuniary condition and solvency of the debtor; and his omission to do so is fatal to the indemnity. This is a principle recognized and acted upon by Courts of Law as well as Courts of Equity.

If, therefore, any of the debts which in August, 1842, were due to the former partnership, and transferred to the new partnership, were then bad or doubtful, and that fact was known to *Currie*, he was, in my opinion, bound to inform *Lipscombe* thereof; and his omission to do so would in my judgment affect the validity of the bond. Is it then the fact that any of such debts were then bad or doubtful? and if so, was it known to *Currie*? What is the evidence upon the subject? The evidence shows, that of the debts transferred to the new partnership in August, 1842, which amounted to upwards of 14,000*l.*, a considerable number, to the amount of more than 1,700*l.*, were, *after the dissolution of the partnership in 1849* and

the bankruptcy of *Butterfield*, ascertained to be irrecoverable, that is, bad debts; but there is not a tittle of evidence to show that any one of them was, at the time of the transfer to the new partnership in 1842 bad, or even doubtful; for of course the fact that a debt is irrecoverable in 1849 is no evidence to prove that it was so seven years previously. So that the Plaintiffs fail to establish the fact which must be the very foundation of their contention upon this point. And there being no proof that such was the fact, there is no proof that it was known to *Currie*. But then it is insisted on the part of the Plaintiffs that any man of common sense must assume it to be highly probable, nay, morally certain, that out of a great number of debts, amounting to more than 14,000*l.*, some will prove irrecoverable, and that *Currie* must have so presumed in this case. Without questioning the truth of this observation, does it not apply with as much force to *Lipscombe* as to *Currie*? Why are we not to assume that this probability, or this certainty (whichever it is to be called) was present to the mind of *Lipscombe* as well as to that of *Currie*? And how does this probability or this certainty constitute a fact which was within the knowledge of *Currie* and not within the knowledge of *Lipscombe*, and which the former was bound to communicate to the latter? In truth, unless there be evidence to show that some of the debts were then bad or doubtful (which there is not), I do not see how the debts then due to the concern should be considered as standing on a different footing from the debts which might subsequently become due to the partnership. For there is of course a high degree of probability that, among the numerous debts which in the course of the next five years will become due to a bank, some will prove bad and irrecoverable: and this is a probability that must occur to the mind of any man of common sense. And why

1853.

SMALL  
v.  
CURRIE.


1853.  
SMALL  
v.  
CURRIE.

should not the banker be just as much bound to inform the surety of the existence of this probability as to future debts as he is to inform him of the similar probability as to the existing debts? In fact, it was for the purpose of meeting this very probability, both as to existing debts and as to future debts, that the bond was required and agreed to be given.

It is not unworthy of observation that, upon the dissolution of the former and the formation of the new partnership in August, 1842, part of the arrangement was, that Colonel *Jolliffe*, who had been a partner up to that time, and who was then retiring, should be paid his capital of 800*l.* in full, and that this should be paid to him by the new partnership. Now it is hardly to be supposed that either *Currie* or *Butterfield* would have assented to this, if he had known or believed that any of the debts then due to the former partnership (all of which were transferred to the new partnership) were at that time irrecoverable; for Colonel *Jolliffe* could only be entitled to be paid his capital in full upon the assumption that all those debts were at that time good debts; and upon any other supposition the continuing partners were assenting to what was a dead loss to themselves, which it is utterly improbable that they would do.

Another matter respecting which it is contended that *Currie* was bound to have given information to *Lipscombe*, as surety, is the whole state and condition of the partnership business in 1842, and particularly the small amount of capital in the concern. If it is meant to be contended that it is essential to the validity of a bond of indemnity against loss by the carrying on of a banking partnership, that the surety, not asking for any information, should be informed of all the transactions and busi-

ness of the concern, I cannot assent to the proposition. Nor can I admit that it is necessary that the surety who does not ask for any information on the subject should be informed of the amount of capital of the partners in the business. But it is insisted that there is this specialty in the case, that, whereas it had been stipulated by the articles of 1833 and those of 1839, that *Jolliffe* and *Currie* should bring in 3,000*l.* in the proportion of two-thirds and one-third, no such capital had been brought in; and the bill charges that *Currie* had in fact brought in nothing, and that *Lipscombe* executed the bond in the belief "that the business had been established by the introduction of a *bonâ fide* and sufficient capital." Now, in the first place, I cannot see how any stipulation as to capital in the articles of 1833 or of 1839 applicable to the partnership of the three, can affect the question with reference to the capital to be brought into the partnership of 1842 between the two. But further, it is a mistake to suppose that the articles of 1833 or of 1839 stipulated that 3,000*l.* capital should be brought in by *Jolliffe* and *Currie*. The stipulation was that the partnership business should be carried on with a capital *not exceeding* 3,000*l.*, to be advanced and brought in by *Jolliffe* and *Currie*, in the proportions of two-thirds and one-third. This imposed no obligation on *Jolliffe* and *Currie*, or either of them, to bring in capital to the amount of 3,000*l.* or any given amount of capital. Now, it appears from the evidence that, according to the books, the amount which *Currie* had in the concern in August, 1842, was 506*l.* 10*s.* 6*d.*, which was composed of three items, viz. 451*l.* 10*s.* 6*d.*, being his share of profits left in the business; 49*l.* 19*s.* 1*d.*, being the residue of a sum of 300*l.* which he had brought in, and 5*l.* 0*s.* 11*d.*, being the balance of his banking account. This sum of 506*l.* 10*s.* 6*d.*, though not originally brought in as capital, was due to

1853.  
  
 SMALL  
 v.  
 CURRIE.

1853.  
SMALL  
v.  
CURRIE.

him from the prior partnership, and was actually payable to him, upon the assumption that the debts and assets of the partnership were all realized; so that this sum constituted the capital of *Currie* in the new partnership, upon the transfer to that partnership of all the then assets and liabilities of the prior partnership. And there was no stipulation in the articles of 1842 that either *Currie* or *Butterfield* should bring in any specified amount of capital. I cannot see that there was anything in the circumstances respecting capital which it especially behoved *Currie* unasked to have communicated to *Lipscombe*, even supposing him to have been ignorant of them.

I cannot help, however, feeling a strong conviction that the state of the partnership concern in August, 1842, and everything relating to it, was at least as well known to *Lipscombe* as to *Currie*. *Currie* was a solicitor in large practice in *London*, where he resided; he had originally joined the partnership to promote the electioneering interests of his employer, Colonel *Jolliffe*. He swears most distinctly that he never interfered in the business, and there is no attempt to contradict him, which might easily have been done (if he was not speaking the truth) by the testimony of Mr. *Bowers*, who was throughout the managing clerk of the bank, and who has been examined as a witness by the Plaintiffs. When Colonel *Jolliffe* retired from the partnership in August, 1842, *Currie* desired also to retire, but was induced, by the solicitations of *Butterfield* and *Lipscombe*, to continue, which he only consented to do on having the fullest indemnity from both. *Lipscombe*, on the other hand, was one of the originators of the bank, partly from zeal in the cause of the *Jolliffe* party at *Petersfield*, and partly from a desire to benefit *Butterfield*, whom he regarded

in the light of a son-in-law, and in whose welfare he took a warm interest. *Lipscombe* lived at *Petersfield*, within a few doors of the bank; kept an account there; was almost daily in the bank, generally two or three times a day, and in continued and close intimacy with *Butterfield*, the sole managing partner. Looking, then, at the relative position of *Currie* and *Lipscombe*, I think it probable (though there is not, and hardly could be, actual proof of the fact) that the latter was at least as cognizant of all matters relating to the bank, which it concerned him as surety to know, as *Currie* was; and at all events, I have no doubt that he had much better means of knowledge than any information which *Currie* could have given him.

1853.  
SMALL  
v.  
CURRIE.

Much stress was laid by the Plaintiff's counsel on the stringent provisions of the bond, and it was contended that they were of so severe and oppressive a character, as to render it utterly improbable that *Lipscombe* could have intended to subject himself to so onerous a responsibility, and that it must be concluded that he thought he was only executing a duplicate of the bond of 1833, by which he merely guaranteed the due performance of the partnership articles by *Butterfield*. Indeed, one of the alternative prayers of the bill is, that the bond may be reformed to make it conformable to that of 1833.

Doubtless the provisions of the bond are stringent and onerous, and such as under ordinary circumstances no prudent person, merely asked by a friend to become surety for him, would be likely to accede to. But when the circumstances of this case are taken into consideration, it appears to me that there is an end to all improbability in the supposition that *Lipscombe* knowingly and deliberately undertook the full responsibility involved

1853.  
 ~~~~~  
 SMALL  
 v.  
 CURRIE.

in the provisions of the bond. *Lipscombe* was the person, or at least one of the persons, who first suggested the establishment of this bank, not as a bank for banking purposes, but a bank for the purpose of being used as a machine for thwarting the proprietor of the then existing bank, who was the political opponent of the *Jolliffe* party at *Petersfield*, and for making advances to the electors of *Petersfield*, and so getting them under the pecuniary influence of Colonel *Jolliffe* and his agents. *Lipscombe* was a zealous partizan of the *Jolliffe* faction; and he had an additional motive for desiring to have this bank established in his desire to procure the means of livelihood for *Butterfield*, to whom he stood in the close and intimate connection before stated. He succeeded in his wish; the bank was established, with this strange combination of partners—the member, or would-be member, for the borough, prefixing to his name a title of military rank, a *London* solicitor in full practice, and a retired farmer; *Butterfield*, the farmer, being, on the recommendation of *Lipscombe* himself, appointed sole managing partner, with a kind of banking tutor in the person of an experienced banker's clerk from *London*, to teach him the mysteries of banking. Of this extraordinary bank, so anomalous and objectionable in its constitution, so anomalous and objectionable in the nature of its intended operations, *Lipscombe* was a zealous promoter and supporter, if not the sole originator. It continued under the articles of 1833 and 1839 until 1842, when Colonel *Jolliffe* resolved to retire; and then to induce *Currie* to continue became a great object with *Lipscombe*, from the same motives as those under which he had originally suggested the establishment of the bank, and he solicited *Currie* to remain, who only consented on the condition of having the fullest indemnity from *Butterfield* and *Lipscombe*. It is important to observe

that, although in August, 1842, a new *partnership* was formed between the two continuing partners, with new articles of partnership, very different from those of 1833 and 1839, yet in fact it was *not a new business*, but simply a continuation of the old existing business ; and such was the intention and understanding of all parties, including *Lipscombe*. The transfer to the new partnership of the assets and liabilities of the old partnership, so far from being a strange or unusual arrangement, would be a matter almost of course where an existing banking business was to be carried on by two continuing partners on the retirement of the third, whatever might be the new arrangements between the continuing partners as to bringing in capital or dividing profits, or any other matter. *Lipscombe*, or indeed any one else, must have taken for granted (even if he had not been particularly informed of it) that for the purpose of continuing the existing concern and business by the continuing partners, even if this had been an ordinary bank established for ordinary banking purposes, the new partnership would probably adopt the assets and liabilities of the old, and among the rest the debts then due to the concern. And in this case there was even more reason than in ordinary cases why the debts due to the old partnership should be transferred to the new partnership ; for the debts then due to the concern were no doubt for the most part due from electors of *Petersfield* on account of advances intentionally made to them, in order to obtain an influence over their votes ; for the very object of the existence of the bank was, by means of such advances, to acquire and preserve that influence ; and that object (which, be it observed, was the main object of *Lipscombe* himself) would have been defeated if those debtors to the concern had not continued such debtors under the new partnership. It is therefore no matter of surprise that *Currie*,

1853.



SMALL

v.

CURRIE.



1853.  
SMALL  
v.  
CURRIE.

when solicited by *Butterfield* and *Lipscombe* to continue in the bank, should yield to their wish only on the condition that his partner *Butterfield* should, as between them, undertake the whole responsibility and risk of the concern, and that he (*Currie*) should be indemnified by *Butterfield*, and by *Lipscombe* as his surety, against any loss which could by possibility accrue to him from the business being continued to be carried on. What is there in the least degree unreasonable or unconscionable in such a requisition? Or what ground is there for thinking it incredible or improbable that *Lipscombe* should readily agree to become surety for *Butterfield*, to indemnify *Currie* against any loss that might arise from the bankruptcy or insolvency of any of the debtors to the bank, including those who were already such debtors, when we see that it was the very object and intention of *Lipscombe*, as well as of *Butterfield*, that the debts due from those persons should *not* be called in, but that they should still continue debtors. It is clear that it was not *Currie* that sought or induced *Lipscombe*, but *Lipscombe* that sought and induced *Currie* in the transaction. The concern has now ended disastrously, and it is immaterial whether this result has been caused by the unusual or illegitimate nature of its operations, or the improvident advances of money to electors of *Petersfield*, or the bankruptcy or insolvency of the debtors, or the paucity of capital employed, or the inexperience or misconduct of *Butterfield*. *Lipscombe* was not deceived or misled, or kept in ignorance as to any of these probable causes of failure. And now that the failure has occurred, his executors come to this Court and ask to be relieved from their legal liability under their testator's bond, insisting that *Lipscombe* ought to be regarded as a mere simple farmer, quite inexperienced in all matters of business, a stranger to the concern, ignorant of its operations, and of the terms and arrangements of the partnership,

innocently and confidingly taking it for granted that the bank was a regular, legitimate bank, which carried on only the usual banking business, with the customary degree of caution and prudence, believing that he was only asked to guarantee *Butterfield's* faithful performance of the articles, and induced by *Currie* to execute the bond in total misconception of its meaning and effect, and in ignorance of facts and matters which it concerned him as surety to know, and which *Currie* ought to have disclosed to him. This representation is in my opinion the very reverse of the reality.

1853.  
SMALL  
v.  
CURRIE.

There remains but one point, and upon that I have only a word to say. It has been contended that the term of five years, for which the partnership of 1842 was agreed upon, having terminated in 1847, the concern ought then to have been stopped and wound up, whereas *Currie* allowed it to go on till 1849; and therefore the bond should be held void. The answer of *Currie* states, and the evidence shows, that it was continued only for the purpose of winding up, and that no loss whatever was incurred by that continuance, to which *Lipscombe* was liable under the bond. But whatever might be made of this point, as a reason for this Court relieving against the bond, is equally cognizable by a Court of Law, and, if available at all, would constitute a good legal defence to the action on the bond. Indeed, this observation applies to most of the other grounds for relief insisted upon by the Plaintiffs, and particularly to the ground of information having been improperly kept back from *Lipscombe* by *Currie*.

As I am of opinion that the Plaintiffs have not made out any case for setting aside or reforming the bond, and as the bill is entirely founded upon the claim to that relief, it must be dismissed with costs.

1854 :  
February 9th.


*Pleading.*  
*Demurrer.*  
*Equity.*

THOMAS JONES SAUNDERS v. THOMAS  
RICHARDSON and JANE his Wife, and others.

The case made by the bill was this. It alleged title, under several instruments, to certain real estates settled thereby, one of such deeds creating a term to raise a sum of money not yet raised. It alleged possession or receipt of the rents in some of the Defendants; and that they had possession of some of the deeds; and that they had given notice to tenants not to pay rent to the Plaintiff, and threatened to distrain: it alleged that the trustee of the term refused to assign it to the Plaintiff. It prayed, among other things, a declaration that under certain of the instruments the Plaintiff was entitled to the estates; and that on payment of the money to be raised by the term, by him, he was entitled to a surrender or assignment of the term: Held, that there was an equity for that relief, if for no more, and the bill was not therefore demurrable.

THE bill stated, that *Anne Lewis*, formerly of *Trefach*, in the parish of *Nevern*, in the county of *Pembroke*, spinster, hereinafter named as *Anne Evans*, widow, was, at the date and execution of the indentures of settlement next hereinafter stated, seised or well entitled to her and her heirs for an estate of inheritance in fee simple, subject only as to one moiety thereof to a term of 200 years, and the trusts thereof for raising 400*l.*, and to an estate for the life of *Anne Lewis*, widow, of or to a certain messuage, tenement and lands, with their appurtenances, commonly known by the name of *Carnymenyn*, situate in the parish of *Manachlogddu*, otherwise *Mona-chlogddu*, in the county of *Pembroke* aforesaid; and of a certain other messuage, tenement and lands, with the appurtenances, commonly called and known by the name of *Bridell*, otherwise *Penpucka*, otherwise *Pentre-pricka*, situate in the parish of *Bridell*, in the said county of *Pembroke*; and of a certain other messuage, tenement and lands, with the appurtenances, commonly called and known by the name of *Pistilmoygan*, otherwise *Pestill Mygan*, situate in the several parishes of *Llanvairnant-gwyn* and *Bridell* aforesaid, in the said county: also certain other messuages, tenements and lands, with their respective appurtenances, commonly called and known by the several names of *Clastyr*, otherwise *Glastyr*


*Parkymarchog*, and *Lower Jordaston*, situate in the parish of *Nevern* aforesaid, in the said county; and of another messuage, tenement and lands, with the appurtenances, commonly called and known by the name of *Upper Jordaston*, situate in the several parishes of *Nevern* and *Morlgrove*, in the said county; and of a certain other messuage, tenement and lands, with the appurtenances, commonly called and known by the name of *Trerickert*, otherwise *Trericket*, situate in the several parishes of *Nevern* and *Bayirl*, otherwise *Bayvil*, in the said county; and of or to a certain other messuage, tenement and lands, with the appurtenances, commonly called and known by the name of *Nantycroy*, situate in the parish of *Verwig*, otherwise *Verwick*, in the county of *Cardigan*; and of or to other messuages, tenements, and hereditaments, which had descended to her as heiress-at-law of her father, *Stephen Lewis*, deceased.

1854.  
  
 SAUNDERS  
 v.  
 RICHARDSON  
 and Others.

It then set out the several deeds stated in the case of *Evans v. Saunders (a)*, of the respective dates of the 18th and 19th April, 1794, the 5th June, 1830, the 5th July, 1833, the 16th July, 1835, and the 26th August, 1836. And it set out the trusts of the term of 500 years created by the deed of 1794, which were for raising portions for the younger children of the marriage, and if there should be no such children, then to raise 400*l.* for such person as *John Evans* should by deed or will appoint, and in default of appointment for the executors or administrators of *John Evans*. It stated the marriage of *Mrs. Evans*, and the death of *John Evans* intestate and without issue. It then set out the will of *Anne Evans*, as follows:—

“ The said *Anne Evans* made her last will and testa-

(a) 1 Drew. 415.

1854.  
  
 SAUNDERS  
 v.  
 RICHARDSON  
 and Others.


ment in writing, dated the 3rd day of March, 1848, and which was executed by her in the presence of and attested by three witnesses. And by the said will, after reciting the hercinbefore stated indentures of lease and release, bearing date respectively the 18th and 19th days of April, 1794, and purporting to be in exercise and execution of the power or authority so given or reserved to her as aforesaid, and of every or any other power or authority enabling her in that behalf, she the said *Anne Evans* did give and devise, and direct, limit and appoint," &c. She went on to appoint the several estates comprised in the settlement of 1794, including *Nanty Croy*, to various persons; and after giving divers pecuniary legacies, the testatrix appointed the Defendants *John Evans*, *John Pugh* and *Thomas Jones*, executors of her will.

The bill then proceeded as follows:—

The said *Anne Evans* departed this life on the 28th of May, 1848, without having altered or revoked her said will, and the same was, on the 13th day of July, 1848, duly proved by the said Defendants, the executors of her said will, in the proper Ecclesiastical Court.

*David Hughes Saunders*, at the date and execution of the said indentures of settlement of the 18th and 19th days of April, 1794, was the second son of the said *Thomas Saunders* named in the said indenture of settlement, which said *David Hughes Saunders*, on or about the 22nd day of October, 1811, intermarried with *Elizabeth Argent*, and on or about the 9th day of November, 1823, the said *David Hughes Saunders* departed this life, and he had issue by his said wife several children, of whom

the Plaintiff was and is the eldest son, and the Plaintiff is now the lawful heir of the body of the said *David Hughes Saunders*, and the said *David Hughes Saunders* did not by any act in his lifetime bar the estate tail limited to him by the said indenture of settlement of the 19th day of April, 1794, of and in the said several messuages, lands and hereditaments therein comprised, and such estates, subject only to the said term of 500 years and the trusts thereof for raising the said sum of 400*l.* by the said indenture of settlement directed to be raised and paid as aforesaid, descended upon and are now vested in the Plaintiff; and by an indenture bearing date the 9th day of December, 1853, and made and executed between and by the Plaintiff of the one part, and *Henry Sadler Mitchell* of the other part, and duly enrolled in her Majesty's High Court of Chancery, all the said estates were conveyed and assured, subject to the said term of 500 years, unto the said *Henry Sadler Mitchell* and his heirs, to the use of the Plaintiff in fee simple, to the intent that all estates tail therein and remainders over might be, as they in fact were, barred.

1854.  
  
 SAUNDERS  
 v.  
 RICHARDSON  
 and Others.

It then stated the creditors' suit, and the proceedings therein, referred to in *Evans v. Evans (a)*, and the special case of *Evans v. Saunders*, and the proceedings therein, and the proceedings in *Evans v. Evans (b)*: it then proceeded as follows:—

All the Defendants hereto claim some estate or interest in some part of the said settled estates, which they pretend were well appointed by the said will of the said *Anne Evans*; and they ought to set forth what estate or interest in the premises each of them respectively claims

(a) 1 Drew. 654.

(b) 1 Drew. 654.

1854.

SAUNDERS

v.

RICHARDSON  
and Others.

to be entitled to, and how he or she makes out such claim.

The above-named Plaintiff in this suit is the same person as the said *Thomas Jones Saunders* in the said last-mentioned decretal order named (a), and is now entitled not only to the clear balance of the proceeds of sale of the said estate called *Nantycroy*, but also to all other the estates which were subject to the limitations to the second son of the said *Thomas Saunders* in the said settlement of the 19th day of April, 1794; but the Defendants hereto, or some of them, dispute the said Plaintiff's right to the said proceeds of sale, and to the said estates so settled on the second son of *Thomas Saunders* as aforesaid remaining unsold; and the Defendants, or some of them, are or is in the possession or receipt of the rents and profits of all the said estates and premises so settled on the second son of *Thomas Saunders* as aforesaid, and also have got into their, his or her hands, custody or power the said indentures of the 15th and 16th days of March, 1793, and of the 18th and 19th days of April, 1794, and the 25th day of August, 1836, and other title deeds, muniments and writings relating to the said estates and premises, and to the custody or possession whereof the Plaintiff is justly entitled.

The Defendants or some of them have given notices to the several tenants upon the said estates so settled on the second son of the said *Thomas Saunders* as aforesaid, not to pay their rents to the Plaintiff, who is justly entitled to them, but to themselves; and they threaten to distrain for the rents that are now due and that will hereafter become due, unless the same are so paid to themselves and the Defendants, who claim to be annuitants

(a) The order made on the hearing of *Evans v. Evans*.

under the said will of the said *Anne Evans*, threaten and intend to distrain for their several annuities upon some part of the said settled estate so alleged to be charged therewith.

1854.  
SAUNDERS  
v.  
RICHARDSON  
and Others.

The Defendant *Bridget Evans* is found to be a creditor of the said *Anne Evans* in the said suit of *Evans v. Evans* to the amount of 400*l.* and interest, and she the said *Bridget Evans* has received rents and profits from the said settled estates to a much larger amount than the said debt and interest so due to her from the estate of the said *Anne Evans*; and the proceeds of the said *Nantycroy* estate belonging to the Plaintiff would have been increased by the amount of the said debt and interest if the same were not deducted therefrom, and such debt and interest ought not to be deducted therefrom, but she ought to have credit for the same in taking the accounts hereinafter prayed of the rents and profits of the said settled estates now in her hands or which have been received by her; and the Plaintiff is entitled to set off as much of the said rents and profits received by her as will be sufficient to satisfy the said debt and interest in satisfaction thereof, and he could not have the benefit of such equitable set off at law, but only in this honourable Court, where alone such matters are properly cognizable.

The said term of 500 years created by the said indentures of settlement of the 18th and 19th days of April, 1794, prior to the limitation of the said settled estates to the second son of the said *Thomas Saunders*, is now outstanding, and the said sum of 400*l.* thereby secured remains due and unpaid, and the Plaintiff is willing to pay the same as this honourable Court may direct.



1854.  
SAUNDERS  
v.  
RICHARDSON  
and Others.

There has not been any issue of the said marriage of the said *John Evans* and *Anne Evans*, and the said *John Evans* has not made any appointment of the said sum of 400*l.*, and there is not now any executor or administrator or legal personal representative of the said *John Evans*, and by reason thereof the Plaintiff is unable to pay the said sum of 400*l.* or to discharge the said settled estates from the same, or to get in or procure a surrender of the said term of 500 years.

The trustees of the said term of 500 years are both dead, and the said *Thomas Evans* survived the said *John Tucker* and died in or about the month of May, 1806, having first duly made and published his last will and testament in writing, dated the 12th day of December, 1805, and thereby appointed his widow *Frances Lucy Evans* the executrix thereof, and on the 28th January, 1807, she duly proved the same in the Prerogative Court of the Archbishop of *Canterbury*.

The said *Frances Lucy Evans* died in the month of May, 1822, having first duly made and published her will, and thereby appointed *William Jones*, another Defendant hereinafter named, sole executor thereof, who duly proved the same in the proper Ecclesiastical Court; and the said term of 500 years so created as aforesaid by the said indentures of the 18th and 19th days of April, 1794, thereby became and is now vested in the said Defendant *William Jones*.

The said Defendant *William Jones* refuses to assign or surrender the said term of 500 years; and if the Plaintiff should bring an ejectment to recover the possession of the said estates, the said outstanding term of 500 years would be set up in bar to the Plaintiff's action,

and would, as the Plaintiff is advised and believes, effectually defeat the Plaintiff of his remedy at law.

1854.


SAUNDERS

v.

RICHARDSON  
and Others.

The said indentures of settlement of the 18th and 19th days of April, 1794, and the said deed poll of the 25th day of August, 1836, are now in the possession or power of the Defendants hereto, or some of them; but the Plaintiff has never had such last-mentioned deeds or the said several indentures of the 15th and 16th days of March, 1793, the 5th day of June, 1830, the 5th day of July, 1833, and the 16th day of July, 1835, or any of them, or any other deeds, evidences or writings relating to the estates so settled on the second son of the said *Thomas Saunders* as aforesaid, or any of them; and the Plaintiff does not know where the said last-mentioned indentures, deeds, evidences and writings, or any of them, now are, unless they be in the custody or power of the Defendants hereto or some or one of them.

The Plaintiff has already, by the proceedings hereinbefore stated, established his title to the said estate called *Nantycroy*, except as to such part thereof as was devised for payment and was necessary to pay the debts of the said *Anne Evans*; and he has the same title to all other the estates which were so settled on the second son of the said *Thomas Saunders* by the said indentures of settlement of the 18th and 19th days of April, 1794, as aforesaid; and the Defendants hereto for themselves respectively claim some estate or interest in the said last-mentioned settled estates under the said alleged testamentary appointment of the said *Anne Evans* deceased, and such Defendants are numerous and ought to be concluded by one decision of this honourable Court, which is a Court of competent jurisdiction in the premises; and the title of the Plaintiff ought to be quieted and es-

1854.  
  
SAUNDERS  
v.  
RICHARDSON  
and Others.

tablished once for all, and a limit or bound put to litigation and the multiplicity of suits or actions prevented; and the Plaintiff ought not to be vexed and oppressed with several processes of litigation against the several Defendants hereto, which would be absolutely necessary if the Plaintiff were to seek relief in a Court of law; and that a final conclusion to litigation between the Plaintiff and the Defendants hereto touching the premises ought to be had and can be had only in this honourable Court, where alone such matters are properly cognizable.

The Defendants, or some of them, have actually distrained upon some of the tenants of the said estates so settled on the second son of *Thomas Saunders* as aforesaid, and there is no remedy at law against such distresses by reason of the tenants of the said estates having previously paid rent or attorned to the Defendants so distraining as aforesaid.

The Defendants respectively ought to be restrained by injunction from prosecuting such distresses and from distraining upon the tenants of the said estates so settled on the second son of the said *Thomas Saunders* as aforesaid, and from receiving or compelling payment of the rents, issues and profits of the said settled estates or any part thereof, and from commencing or prosecuting any action, suit, or other proceedings for the recovery of the said rents, issues and profits or any part thereof, and from otherwise interfering or intermeddling with the tenants of the said settled estates or the occupation or management thereof.

A receiver ought to be appointed of the rents, issues and profits of the said estates so settled on the second son of the said *Thomas Saunders* as aforesaid, and all

necessary and proper powers and directions given to such receiver in the premises.

1854.

SAUNDERS

v.

RICHARDSON  
and Others.

The Defendants have had frequent communications with each other, by parol or in writing, touching the matters aforesaid or some of them, and they ought to set forth all such communications and the purport or effect thereof.

The Defendants, or some or one of them, have now or had lately in their, his or her possession or power, or in the possession or power of their, his or her solicitors or agents, solicitor or agent, divers deeds, documents or muniments of title, abstracts or copies thereof or extracts therefrom, maps, plans, letters, accounts, books of account, diaries, receipts, vouchers, memoranda, papers and writings relating to or mentioning or showing the truth of the several matters aforesaid, and which the Defendants ought to produce, but which they refuse to produce.

The bill prayed as follows :—

That it may be declared that the appointment purported to be made by the will of the said testatrix *Anne Evans* is not a good and valid disposition of any of the estates and hereditaments comprised in the said settlement of the 19th day of April, 1794; and that the Plaintiff, under and by virtue of the said settlement and the said disentailing deed of the 9th day of December, 1853, is now entitled to such and so many of the said estates as were thereby settled on the second son of the said *Thomas Saunders* as aforesaid, for an estate of inheritance in fee simple in remainder, expectant upon the determination of the said term of 500 years created by the said settlement, and is entitled to an assignment or surrender of the said

1854.

SAUNDERS

v.

RICHARDSON  
and Others.

term upon payment of the said sum of 400*l.* thereby secured.

That the said Defendants may be decreed to deliver up to the Plaintiff the possession of the said settled estates and hereditaments remaining unsold, and to pay to him the proceeds of the sale of such parts thereof as have been sold, free from all incumbrances done by them or any of them ; and also to deliver up to the Plaintiff the said indentures of the 18th and 19th days of April, 1794, and the 25th day of August, 1836, and all other title deeds, muniments and writings belonging or relating to the same settled estates and hereditaments, proceeds and premises, or any of them or any part thereof, in the custody or power of the said Defendants or any of them respectively ; and that a proper assignment of the said term of 500 years may be made and executed to the Plaintiff or as he shall direct, by all proper parties, he, the Plaintiff, being willing and hereby offering to pay to the credit of this cause the said sum of 400*l.*, as this honourable Court may think fit to direct.

That for the purposes aforesaid, all proper directions may be given, inquiries made, and accounts taken.

That the said Defendants may also be decreed to come to a just and fair account with the Plaintiff, for and to pay to him all the rents and profits of the said settled estates and hereditaments which have been received by them, or any of them, or by any other person or persons, by their or any of their order, or for their or any of their use ; and that what shall have been received by the said Defendant *Bridget Evans*, or a sufficient part thereof, may be set off in full discharge of her debt and interest found due to her from the estate of the said *Anne Evans* in the said suit of *Evans v. Evans*.

That the Plaintiff's title, as declared by the said last-


mentioned decretal order in the said suit of *Evans v. Evans* and on the said special case, may be quieted and established, not only as respects the said estate called *Nantycroy*, but also as respects all other the estates and hereditaments so settled on the second son of the said *Thomas Saunders* by the said indentures of settlement of the 18th and 19th days of April, 1794, as aforesaid; and that the Plaintiff may have the benefit of the said decretal order as against the Defendants hereto.

That the Defendants respectively may be restrained by injunction from prosecuting such distresses as they have already made on any of the tenants of the said settled estates, and from distraining upon any of the tenants of the said settled estates, and from receiving or compelling payment of the rents, issues and profits of the said settled estates, or any part thereof, and from commencing or prosecuting an action, suit or other proceeding for the recovery of the said rents, issues and profits, or any part thereof, and from enforcing or prosecuting any proceedings by way of replevin, and from otherwise interfering or intermeddling with the tenants of the said settled estates or any of them, or the occupation or management thereof or of any part thereof.

That a receiver may be appointed of the rents, issues and profits of the said estates so settled on the second son of the said *Thomas Saunders* as aforesaid, and all necessary and proper powers and directions given to such receiver in the premises.

That the Plaintiff may have such further or other relief as the nature of the case may require.

This case came on upon demurrer, and the point principally argued was the general question of the Plaintiff's equity, viz., whether, supposing him to have the title which he alleged, he had shown a right to any of the

1854.  
  
 SAUNDERS  
 v.  
 RICHARDSON  
 and Others.

1854.  
~  
SAUNDERS  
v.  
RICHARDSON  
and Others.

relief prayed; or whether he had not mistaken his remedy in coming into equity. There were several other grounds of demurrer suggested: 1st. As to the sufficiency of allegation of title; 2ndly. As to multifariousness; 3rdly. As to parties; but as the Court thought these points all clear for the Plaintiff, and decided them without requiring any argument from counsel for the bill, they are not here reported.

Mr. *Tripp*, for the demurrer.

The Plaintiff has no equity to have the term assigned to him. If he is, as he alleges, entitled, his proper remedy is at law. He cannot come here to have in effect an ejectment. If it is said that the 500 years term stands in his way, his remedy would have been to have that removed by injunction; but for that the bill did not pray, and it could not therefore be decreed if this were the hearing of the cause.


Mr. *Daniel* and Mr. *Greene*, for the bill.

The Plaintiff cannot proceed at law by reason of the existence of the 500 years term; nor could he have asked for an injunction to restrain the Defendants from setting that up. He has neither the legal title nor the control over it; and in the state of circumstances shown by this bill as to existing interests in that term, the Court would never restrain its being set up. It is an unsatisfied term; there are duties to be performed under it; and the Court would never interfere with the right of possession of persons for whom the term is still a subsisting active term. If we cannot have the relief we ask in this Court, we are without relief.

Mr. *Tripp*, in reply.

There is no such distinction as that the Court will

restrain the setting up of a satisfied term, and will not do so with reference to an unsatisfied term. The true principle is, that the Court will not allow a term to be set up in ejectment wherever it would be inequitable that it should be so used; and if the Plaintiff had so shaped his bill, the Court might, if it thought the setting up of the term inequitable, restrain it. [He referred to *Red. on Plead.* (a).] But no such relief is asked, and the relief that is asked is an equitable ejectment, and cannot be granted.

1854.  
  
 SAUNDERS  
 v.  
 RICHARDSON  
 and Others.

The VICE-CHANCELLOR, after referring to the other grounds of demurrer, proceeded as follows :

The material question in this case, and that most discussed, is whether the Plaintiff is entitled to the relief or to any part of the relief that he asks; for, in order to allow a general demurrer for want of equity, it must be shown that in the state of things alleged by the bill the Plaintiff would not, if the cause was at the hearing, be entitled to any portion of the relief asked, or to any relief, consistent with the facts alleged. Now, in considering this case, I must assume that I have determined that Mrs. *Evans* had no power to appoint by will, and that the Plaintiff is the person entitled in remainder in default of such appointment: that I say must be assumed to have been decided.

The Plaintiff then comes here, making this case. He says, " This is my estate, and if there were nothing more, I might bring ejectment; but prior to my estate, is a term of 500 years, by means of which is to be raised a sum of 400*l.* for the benefit of the executors or administrators of *J. Evans*: I cannot therefore bring an ejectment."

(a) 5th edit., page 156.



1854.  
SAUNDERS  
v.  
RICHARDSON  
and Others.

The Plaintiff is willing and offers to pay the 400*l.*; but the trustees of the term are dead; the representative of the survivor is before the Court. The Plaintiff says he would bring also before the Court the executors of *J. Evans*, but there are none. He says he is willing to pay the money to the representative of the surviving trustee, but he refuses to accept it and to assign the term (and, I think, he very properly refuses to do so, otherwise than under the direction of this Court). The Plaintiff says that under these circumstances his right is this:—He has a right to come here to be relieved from that impediment to his obtaining possession of his estate; to be allowed to pay the 400*l.*, and to get an assignment of the term from the person entitled, whoever he may be. As against *Jones*, the representative of the trustee of the term, and if there were any, the executors of *J. Evans*, the Plaintiff would be clearly entitled to come here; but if he came against them alone, and then the question arose whether, on the construction and effect of these different instruments, he had any right, I should be obliged to yield to the objection that there would be a want of parties, unless those who claim under the will of Mrs. *Evans* were made parties. However, the Plaintiff has brought *Jones* before the Court, and he assigns, I think, sufficient reason why he has not brought the legal personal representative of *J. Evans*; and he has also brought the persons who maintain that they are entitled under Mrs. *Evans*' will. Having brought all those parties here, he prays [the Vice-Chancellor referred to the first paragraph of the prayer].

Now, can I say that, if this were the hearing, the Court would not give at any rate that relief; it appears to me clear that it would. The Plaintiff would have a right to have that question decided; and if decided in his favour, what I should have to direct would be, that he

should pay the 400*l.* into Court, and then that *Jones* should assign or surrender the term to a trustee for him; and if I refused all other relief, the Plaintiff would be entitled to that, and would then be in a position to bring ejectment by using the term.

1854.  
SAUNDERS  
v.  
RICHARDSON  
and Others.

1854 :  
11th and 13th  
February.

Partners.  
Power of to bind  
each other.

BISHOP v. COUNTESS OF JERSEY and others.

THE bill in this case was filed by Mrs. *Bishop*, a widow, against the present members of the banking firm known as *Child & Co.*, and it sought to render those members liable to repay to the Plaintiff a sum of 5000*l.* of which it alleged she had been defrauded by a former member of the firm, who had since been expelled and had absconded.

*A.*, a partner in a banking firm, advised *B.*, a female customer of the bank, to sell out some Dutch stock, telling her the firm could procure for her better security, and that he had one in view; he said the money was in fact wanted by his own son, who was in trade. *B.* sold out the stock and paid the money into the bank; she then gave *A.* a cheque to draw

The facts of the case, so far as they appeared by the evidence, were as follows. The Plaintiff, by her affidavit, made the following statement :—

1. The Defendants, the Honourable Lady *Sarah Sophia* Countess of *Jersey*, *William Henry Smith*, *John Wormald* and *John Copp*, before, and at the several times hereinafter mentioned, carried on the trade or business of bankers at *Temple Bar*, in the city of *London*, in

it out and invest it. He drew it out and misapplied it and absconded, the interest having been regularly carried to her account in the meantime in the books of the bank, but by whom did not clearly appear. All these transactions took place at the banking-house, and *B.* had no acquaintance or dealings with *A.* except as banker and a member of the firm. The other partners did not appear to have known of them at the time they took place, but they did before *A.* absconded. Held, that they were not liable.

1854.

BISHOP

v.

COUNTESS OF  
JERSEY  
and Others.

copartnership with one *William Wood*, under the style or firm of *Child & Co.*

2. In the year 1842, by the death of my husband Captain *Archibald Wyndham Bishop*, I was left a widow with a property of a moderate amount, a great part of which was invested in 81,000 guilders of two pounds ten shillings per centum *Dutch* bonds, and 60,000 guilders four pounds per centum *Dutch* bonds; that is to say, bonds issued by the *Dutch* government and payable to bearer.

3. My late husband and his father, and various members of his family, had, during a great part of the last and during the present century, banked with the firm of *Child & Co.*, and had, as I well knew, entertained great respect for the said firm, and placed unlimited confidence in the said firm and in the suggestions or advice made or given by the said firm, or any member thereof, in the course of their said business of bankers.

4. For the reasons aforesaid, I, on the death of my husband in the year 1842, continued to employ the said firm of *Child & Co.* as my bankers, and allowed them to retain in their custody the said *Dutch* bonds; and the said firm of *Child & Co.* thenceforward, from time to time, received the interest or income arising on the said *Dutch* bonds and upon any other funds or securities belonging to me.

5. I myself was and am so little acquainted with matters of business, and I had such implicit confidence in the firm of *Child & Co.*, that I left to the said firm of *Child & Co.* the receipt and management of my income, and I was guided by the suggestions and advice from

time to time made and given to me by the said firm relative to the investment or any alteration in the investment of my property.

6. Sometime in the end of the year 1847 I attended at the banking house of the said firm of *Child & Co.*, in the usual way as a customer of the said firm, on the subject of my account, and I had an interview with the said *William Wood*, as one of the partners and on behalf of the said firm, relative to the state of my account with them; and the said *William Wood*, as such partner in and on behalf of his said firm, then stated to me that he thought the said *Dutch* bonds were an objectionable form of security from which to derive my income, and that it would be much more prudent to take my money out of those foreign securities; that they were not thought so safe as heretofore. He added, that an opportunity just then offered of placing out 5,000*l.* for me at 5*l.* per cent. on a good and safe investment, and he advised me to allow the sale of my said *Dutch* bonds, and out of the proceeds to lend 5,000 on the said investment.

7. I was much gratified by the attention of the said *William Wood* on behalf of the said firm to my affairs; and I say that I never saw the said *William Wood* except in the banking house of the said Messrs. *Child & Co.*, and never had any acquaintance with the said *William Wood*, except in his character of a partner in the said firm and derived from my interviews with him as such partner at the said banking house; and I was willing to take the advice so given to me relative to the said investment; but as the sum proposed to be invested was large, and as I myself knew nothing of securities, I said, as the fact was, that I thought it my duty to communicate with some of my relations, and particularly with my

1854.



BISHOP

v.

COUNTESS OF  
JERSEY  
and Others.

1854.  
BISHOP  
v.  
COUNTESS OF  
JERSEY  
and Others.

brothers-in-law, as to the propriety of disposing of the said *Dutch* bonds, before I would consent to do so.

8. The said *William Wood* thereupon told me that the offer of the said investment must be accepted or declined at once, and that he, meaning himself, as managing partner of the said firm of *Child & Co.*, had daily large sums of money passing through his hands belonging to customers, who would eagerly avail themselves of an investment so desirable as that offered to me, and that it was consideration for me only which had induced the proposal of the investment to me, and that if it was accepted by me it must be accepted without consultation with any other person; that I was advised for my advantage.

9. Having entire confidence in the said firm of *Child & Co.*, and believing in the truth of the statements so made by the said *William Wood* as their partner, I authorized the said firm of *Child & Co.* to sell the said *Dutch* bonds which were so in their custody as aforesaid; and in the banking house of *Child & Co.*, at *Temple Bar*, I signed a document placed before me by the said *William Wood* for 5,000*l.* of the proceeds to be advanced on such security or investment as had been so proposed to me, and I agreed at the same time, at the suggestion of the said *William Wood* on behalf of the said firm, that the residue of the proceeds of the said *Dutch* bonds should be applied by the said firm in purchasing bank stock in my name and on my account.

10. In order to authorize the said firm of *Child & Co.* to do what, through the said *William Wood*, they had undertaken to do as aforesaid, I signed whatever documents were put before me by the said *William Wood*,

which documents were prepared by the said *William Wood*, or by his order, in the bank, trusting everything to the said *William Wood* as one of the partners in the said firm, and I believe one of the said documents was an authority to the said Messrs. *Child & Co.* to sell the whole of my *Dutch* stock, and to invest the balance, after reserving 5,500*l.*, in bank stock, which authority is dated the 18th day of January, 1847, by mistake, I believe, for 1848; and that the other of such documents is a cheque on Messrs. *Child & Co.* directing them to pay to Mr. *Jackson* or bearer 5,000*l.*, which is dated the 27th day of January, 1847, by mistake, I believe, for 1848; and I say that I had not and have not any knowledge whatever of the name of *Jackson* mentioned in the said cheque, but I believe the same had some connection with the security the said *William Wood*, as the managing partner of the said firm, was providing for me.

1854.  
BISHOP  
V.  
COUNTESS OF  
JERSEY  
and Others.

11. The said firm of *Child & Co.*, in the month of January, 1848, sold, through the broker of the said firm, my said *Dutch* bonds for a sum of 8,173*l.* 2*s.* 6*d.*, and they received the purchase money for the same, and out of the said purchase-money the said firm of *Child & Co.*, through their broker, expended the sum of 2,653*l.* 4*s.* in the purchase of a sum of 1,340*l.* bank stock, in my name and for my account.

12. The said sum of 5,000*l.*, nor any part thereof, was not invested; but, in breach of their duty to me, the said Messrs. *Child & Co.* permitted the said *William Wood* to take the said sum of 5,000*l.* out of the said purchase-money, and the said *William Wood* did take the said sum of 5,000*l.* out of the said purchase-money, and did apply the said sum of 5,000*l.* to his own use.


1854.  
BISHOP  
v.  
COUNTESS OF  
JERSEY  
and Others.

13. The said firm of *Child & Co.*, acting through and by the said *William Wood*, in order to conceal the said transaction from me and from my friends, represented to me or led me to believe, in and for a long time after the month of January, 1848, that the said sum of 5,000*l.* had been duly and safely invested according to the said undertaking of the said *William Wood*; and in particular the said firm, in the account between them and me, debited me, as on the 28th January, 1848, with the sum of 5,000*l.* as paid to a Mr. *Jackson*, and on each of the days following, namely, the 28th July, 1848, and the 28th January, 1849, credited me with the sum of 120*l.* 7*s.* 1*d.*, being one-half of a year's interest on 5,000*l.* at 5*l.* per cent., less income tax, and the said firm thereby induced me to believe, and I did believe, that the sum of 5,000*l.* had been lent out upon a safe and proper security.

14. In the month of July, 1849, I was informed by a message sent to me from the firm of *Child & Co.*, through a relative of mine who had called at the said banking house, and the fact was and is, that the said *William Wood* had become insolvent, and had decamped to *America*, and had ceased to be a partner in the said firm.

15. The Defendants hereinbefore mentioned, after the absconding of the said *William Wood*, continued to carry on and now carry on the said business under the name and firm of *Child & Co.*, and in the month of July, 1849, I having called at the banking house of the said firm, and having mentioned the circumstances hereinbefore stated, one of the partners in the said firm told me that some of their people, meaning, as I believe, some of the persons belonging to or employed by the said firm, were, before the absconding of the said *William Wood*, aware of the

appropriation by the said *William Wood* of the said sum of 5,000*l.*, and that they regretted the same, but that they did not consider themselves liable to make good the same to me.

1854.  
  
 BISHOP  
 v.  
 COUNTESS OF  
 JERSEY  
 and Others.

16. The banking book now produced and shown to me, marked A, is my banking book with the said firm during the occurrence of the measures before stated.

17. It is now alleged by the Defendants that the said *William Wood* was a personal friend of mine, and that I had applied to him and acted under his advice with reference to the investment of money as a personal friend of mine, and not in the character of a partner in the said firm; but I positively state that I had no acquaintance with the said *William Wood* except that derived by my being a customer of the said firm, and from seeing and being attended to by the said *William Wood* upon the occasions upon which I went to the said banking house upon business, and that I never should have thought of consulting or advising with the said *William Wood* on measures of business, except or otherwise than as a partner in the said firm.

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In oral cross-examination the witness deposed as follows:—

I made an affidavit on 12th July, 1853. Captain *Bishop* died in 1842, 26th May, at that time he was possessed of the *Dutch* bonds mentioned in the affidavit, one in the five pounds per centum, the other two pounds ten shillings; I claim the whole under the will. At his death they were at *Child & Co.*'s; I allowed them to remain there. I think I was the executrix named in my husband's will, but I did not act. To effect the object



1854.  
  
 BISHOP  
 v.  
 COUNTESS OF  
 JERSEY  
 and Others.


of the will some *Dutch* bonds were sold out by *Child & Co.* in July, 1842. I had some stock in the new Three pounds ten shillings per centum, to which I was entitled under my husband's will; the dividends of which *Child & Co.* received for me up to the departure of Mr. Wood. There was 2,000*l.* owing from Capt. *Cunningham* to my husband upon the sale of his commission. I believe that *Child & Co.* had the security for this; they said they could not find it; they doubted if they had it. *Child & Co.* received the interest upon this sum up to and after my husband's death. Those were all the monies upon which *Child & Co.* received the interest for me up to October, 1842.

As to paragraph 6: *Child & Co.* continued to receive the interest on the above sums on my account up to the end of 1847. I had not parted with any of these. I had a mortgage of 2,000*l.* left to me by my aunt in October, 1842: the interest of this was paid into *Child's* by Mr. *Slaney* or other parties. The mortgage was paid off in 1849; the principal was not paid into *Child's*. I had ceased to bank there in July, 1849, and the 2,000*l.* was paid off a short time afterwards. Between 1842 and 1847 I bought some Crown Life Insurance shares, and *Child & Co.* received the interest upon them. Some of them were bought on the 24th June, 1845, and some in March, 1848, and some in June, 1848. I think there was nothing else. *Child & Co.* had the *Dutch* bonds, and I supposed they had Captain *Cunningham's* security. I saw Mr. Wood in the latter end of 1847. I may have seen Mr. Wood during my husband's lifetime, when I went to the shop with my husband. I do not know who I saw. Mr. Wood was very attentive to all my affairs—always exceedingly civil. Between May, 1842, and 1847, I was frequently in the habit of

going to the shop, because the money was not regularly paid in by Mr. *Cunningham* and Mr. *Slaney*. I should say I did not go half-a-dozen times per annum to the shop in that time. On these occasions I always asked for Mr. *Wood*: he was the person appointed by the firm to see me, and therefore I asked for him. I supposed he had the supervision of my affairs. I was not present when he was appointed, but I suppose that when a particular person comes forward to attend to my business, he is appointed by the partners. Mr. *Wood* told me that he was well acquainted with one of my friends: he told me that he was acquainted with my eldest brother-in-law. He was acquainted with others of my friends, as being a member of *Child & Co.*, in the same way that I was acquainted with him. In March, 1849, I had borrowed 400*l.* of *Child & Co.* On the occasions when I have called at the shop I was shown into a private room, and there Mr. *Wood* came to me, and then he and I, without the interference of the other partners, talked over the business I had come about. I never remember any of the other partners coming into the room and taking part in our conversation; but when I went to the shop and Mr. *Wood* was not there, I asked for my book, and some one else gave it me.

1854.  
BISHOP  
v.  
COUNTESS OF  
JERSEY  
and Others.

As to paragraph 6: I think no one else was present at my interview with Mr. *Wood*; that took place in the private room. I made no inquiry as to whether the investment was good and safe, I had such confidence in *Child & Co.* I should not have taken the advice from any where else. He told me it was his son, who was in a very good way of business, who required 5000*l.* He told me the son was carrying on business somewhere in *London*. I think he told me what business and where, but I did not particularly observe; I felt so confident that

1854.  
  
 BISHOP  
 v.  
 COUNTESS OF  
 JERSEY  
 and Others.

the advice I got in that house could not be objectionable, that I agreed to lend the money, and assented to the sale of the *Dutch* stock. This is my order for the sale: it is put in marked A a. It is dated 18th January, 1847; that is a mistake for 1848. This order was placed before me by Mr. *Wood*, and I signed it. In January, 1848, there is an entry of the produce of the *Dutch* bonds. The pass book is put in marked B. On the 27th January, 1848, a cheque was laid before me by Mr. *Wood*, dated 27th January, 1847, by mistake for 1848, for 5,000*l.*, which I signed: probably I read it, but my impression was that it was all right. I did not ask who Mr. *Jackson* was: I do not know now. I only know that it was the investment that was recommended to me by Messrs. *Child's* partners. I left this cheque in the hands of Mr. *Wood*. On the following day I am debited in the pass book with 5,000*l.* At that time Mr. *Wood* handed to me a promissory note. Mr. *Wood* also handed to me a policy of insurance on the life of his son. I took the policy and the promissory note away with me: from that time, they remaining in my possession until the departure of Mr. *Wood*. I had them on the discovery of Mr. *Wood's* departure. I had never been told that it was necessary to produce the note and the policy. My solicitors have not asked me, within the last ten days or a fortnight, to look for that note or policy of insurance.

As to paragraph 9: At the time of making this affidavit, I had not forgotten that I had received from Mr. *Wood* a promissory note and a policy of insurance: I do not remember that I thought of it in connection with my affidavit. I knew that I had got it. I saw the promissory note about July, 1849, when I heard from *Child & Co.* that Mr. *Wood* had gone to *America*. The policy was with the promissory note. I think my impression

is that I took them to show to Mr. *Lavie*, my solicitor. I have not seen them since, I think.

1854.



BISHOP

v.

COUNTESS OF  
JERSEY  
and Others.

As to paragraph 15: My brother-in-law, the Rev. *Freeman Bishop*, called with me at *Child's* in July, 1849. We asked for one of the partners. A gentleman came in: I think it was Mr. *Shepherd*, but am not sure. I think I stated that I had come in consequence of the message I had received from Miss *Louisa Bishop* on the previous day. Mr. *Shepherd* came in, looking very nervous and very uncomfortable: he said very little in answer to my remark. Towards the end of the conversation he said, "Well, I may as well say that we were aware of the transaction:" and then I said, "but not before Mr. *Wood* went off?" He hesitated a little, and then said, "I believe some of our people knew of it," or words to that effect. That is all I recollect of the conversation. I do not trust myself to words; I am giving the substance. I still think it was Mr. *Shepherd*. I do not know the persons of the partners; I know their names; but only since the litigation. I received interest on the 5,000*l.* I suppose that is the 5,000*l.* secured by the note. At all events, it was the investment recommended to me by Messrs. *Child's* partner. I received the interest half yearly: it is entered in my pass book. There are two entries: July, 20, 1848, Mr. *Jackson*, 121*l.* 7*s.* 1*d.* This is one half-year's interest, deducting income tax. Next entry: January 28, 1849, Mr. *Jackson*, 121*l.* 7*s.* 1*d.* I do not know of any application having been made to Mr. *Wood*, junior, after the departure of his father. No one has been communicated with but Messrs. *Child*, I believe. If any application had been made to Mr. *Wood*, junior, it has been without my authority. I never was applied to to pay the premium on the policy of insurance, which appears to be-

1854.  
BISHOP  
v.  
COUNTESS OF  
JERSEY  
and Others.

come due on the 31st December, 1848. I now look at a letter which is produced: it is in my writing, and addressed to Mr. *Wood*. It is put in marked D.

Re-examined on behalf of the Plaintiff.

I wrote this letter to Mr. *Wood* when I wrote about my banking business, and any allusion I may have made to private affairs was consequent upon any little conversation we might have had after we had talked over my banking business. Several members of my family have banked with Messrs. *Child & Co.*, the present generation and the one before it. Lady *Hunter* and Mrs. *Haslewood* had both banked with *Child's* before their marriage, and one after. I understood Mr. *Wood* was acquainted with them as their banker. I never met him except in the bank. The partner whom I saw, and who I think was Mr. *Shepherd*, did not deny that a message had been sent to me from their house. I do not know why the entries of interest on the 5,000*l.* are made in the pass book in the name of *Jackson*. I suppose it was something connected with the investment. I do not remember that Mr. *Wood* ever mentioned the name of *Jackson* to me. I took from Mr. *Wood* the documents he gave me. I knew that the promissory note and policy were the securities for the investment. I was satisfied, from its being done by a member of the banking firm, that it was an investment I might rely upon. I think I knew at the time that the money was lent for five years: it was written upon the paper. I did not inquire from any one whether the premium on the policy was paid in December, 1848. I did understand that for the validity of this security that it was necessary that the premium on the policy should be paid. I did not show either the promissory note or the policy to any of my friends. I did not mention to any of my friends that I had lent the

money: I was satisfied that any advice I had in *Child's* house was so safe, there was no need to do it. I had communicated with my friends on other business some time previous to this transaction. I had heard from some of my friends that *Dutch* stock was not a safe investment: I did not trust to this, but the next time I went to *Child's* on business I asked whether it was so considered. Mr. *Wood* told me that it was safe, that they did consider it safe; when Mr. *Wood* suggested to me that there were good investments, I spoke to him about mentioning it to my friends. Mr. *Wood* said that "I was not to do so; I was either to accept it or refuse it; that there were a great many people who would be only too glad to have it." In consequence of what he said I did not mention it.

1854.  
BISHOP  
v.  
COUNTESS OF  
JERSEY  
and Others.

The following documents were put in evidence:— first, the direction to *Child & Co.* to sell, which it was admitted was by mistake dated 1847 instead of 1848:—

" *London*, 18th January, 1847.

" Messrs. *Child & Co.*,

" Sell the whole of my *Dutch* stock and invest the balance, after reserving 5,500*l.*, in bank stock.

" 4 per cents.

" *Eleanor Bishop*,

" and 2½ per cents.

" 19th January."

Next, the cheque drawn by Mrs. *Bishop* and cashed by *Wood*. The same mistake of date occurs in this; it was really drawn in 1848.

" Messrs. <i>Child &amp; Co.</i>	£	" <i>London</i> , 27th January, 1847.
" Pay Mr. <i>Jackson</i>	or	Bearer five thousand pounds.
" £,5000.		" <i>Eleanor Bishop</i> ,
		" January 28."

1854.  
  
 BISHOP  
 v.  
 COUNTESS OF  
 JERSEY  
 and Others.

Next, the promissory note of Mr. *Wood's* son.

" *Rotherhithe* Cement Works,  
 " 24, *Church* Street, January, 1848.

" Five years after date hereof I promise to pay  
 Mrs. *Eleanor Bishop*, or to her order, five thousand  
 pounds for value received, together with interest for the  
 same at the rate of five per cent. per annum until dis-  
 charged.

" £5,000 and interest. " *William Wood, Junior.*"

Then Mr. *Wood's* guarantee, which was endorsed on the  
 note.

" I hereby guarantee payment of the principal of this  
 note at the period within mentioned, if required, together  
 with the interest at the rate of five per cent. half-yearly,  
 and also the premium on a policy of assurance on the  
 life of *William Wood, junr.*, dated the 31st December  
 last, for £5,000, annually, as it becomes due.

" *William Wood, Temple Bar.*"


Lastly, Mrs. *Bishop's* letter to Mr. *Wood*, the exhibit D.,  
 p. 154.

" My dear Mr. *Wood*,

" I am much obliged to you for your kind note and  
 the book.

" With regard to the £400 which you have been good  
 enough to have placed to my account, I should, if you  
 please, like it to remain as it is at present, because I  
 trust by July next to be able to repay at least £200. I  
 have found a tenant for my house, but only till the 1st  
 of June ; however he may possibly stay on a little longer,  
 which will be all in favour of my liquidating my appalling  
 debt of £400."

The *Solicitor General*, for the Plaintiff, after stating the facts, proceeded to argue. The partners were cognizant of the fact of *Wood's* fraud upon the Plaintiff before he absconded, and they did not communicate any of their knowledge to the Plaintiff. *Wood* was one of the managing partners of the firm; it was with him that the Plaintiff had all her business dealings with the bank. It was he who recommended her to sell her *Dutch* stock and to allow *Child & Co.* to procure for her other securities. [The learned counsel referred to the letter of the 18th January, 1848, the promissory note and the evidence.] Of all these transactions the other partners were fully aware before *Wood* went away. It is true that the fact of *Wood's* inducing the Plaintiff to part with 5,000*l.* on the assurance that the firm would procure her better securities, rests principally upon her evidence; but it is corroborated by the circumstance of the cheque being made payable to *Jackson*, and of the interest on them being always carried to her account as paid by *Jackson*, when there is no proof that such a person ever made any such payments; and the inference is, that the sums never were paid into the bank at all, but were carried to the Plaintiff's account by one of the partners, *Wood*. [He referred to *Blair v. Bromley* (a) and *Sandilands v. March* (b).] The extent to which partners make each other liable as agents, goes beyond that which is strictly their ordinary and usual course of business; it goes to that which is so near akin to their ordinary course of business, that persons dealing with a partner may fairly and reasonably conclude that it is in their usual course of business, and that was the case here. The money did find its way into the bank; it was drawn out by a cheque, signed it is true by the Plaintiff, but that cheque was obtained by

1854.  
  
 BISHOP  
 v.  
 COUNTESS OF  
 JERSEY  
 and Others.

(a) 5 Hare, 542, and 2 (b) 2 Barn. & Ald. 673.  
 Phil. 354.



1854.  
  
 BISHOP  
 v.  
 COUNTESS OF  
 JERSEY  
 and Others.

the fraud of *Wood*, one of the partners, and his copartners were affected with knowledge of his fraud. In getting the money, and afterwards the cheque, *Wood* acted so that the Plaintiff could scarcely avoid believing that the dealing was part of the ordinary course of dealing of *Child & Co.*

With him Mr. *Cairns*.

Our case is this:—There was a customer of this bank, a female, ignorant of business, who deals with the managing partner. He makes representations to her about obtaining for her safe securities for her money, and by those representations he obtains the money: his partners are bound. [He referred to *Story* on Partnership (a), *Willett v. Chambers* (b), *Rapp v. Latham* (c).] Now the principle of these cases is this:—If one partner makes representations to a customer of the firm, however untrue they may be, the customer has a right to be put in the same position by the other partners as if the representation had been true. Besides, here the produce of the bonds, it is admitted, came into the hands of the firm, and they must discharge themselves. How do they do that? Why, by showing that they were authorized to pay a cheque to bearer; but that cheque was itself obtained by one of the partners by fraud. That was no valid authority to the partners to pay, no more than if the cheque had been forged by one of the partners. [He cited on this *Small v. Atwood* (d).] Now, upon this authority, if it is true that *Wood* got the cheque by fraud, the property of it remained in the customer. [He also referred to *Stone v. Marsh* (e), *Marsh v. Keating* (f), and *Sadler v. Lee* (g).]

(a) Page 107.

(b) 2 Cowp. 814.

(c) 2 Barn. & Ald. 795.

(d) 1 Younge's Eq. Exch.

407, in particular, p. 535.

(e) 6 B. & Cress. 551.

(f) 2 Clark & Fin. 250.

(g) 6 Beav. 324.

The next question is, were the acts done by the absconding partner within the scope of the business of the bank. [He referred to a passage in the answer, which, he argued, went the length of showing that the firm did undertake to find investments for their customers (a).] If so, then the fact of *Wood* fraudulently representing the securities to be good, when they were in fact no security at all, cannot affect the case. But even if the transaction was beyond the scope of the business, if a partner makes a representation in reference to a dealing beyond the scope of the business, and the other partners know that such dealing is going on and take no steps in it, they are bound. [He referred to the evidence showing the knowledge of the other partners.]

Mr. *Cotton* appeared for Lady *Jersey*. Mr. *Willcock* and Mr. *Ogle* for the other Defendants.

The VICE-CHANCELLOR, without calling on the other side:

I am quite satisfied the Plaintiff cannot succeed. I cannot but feel great sympathy for her, but the ground of my sympathy is simply that she is a female; if this had been the case of a male, I should have felt neither doubt nor sympathy. The question is one simply of law,—whether, as between the Plaintiff and certain other persons, both innocent, she or they must suffer. In 1842 the Plaintiff's husband died; she then continued to bank with Messrs. *Child*; one of the partners was Mr. *Wood*, and, as is very usual in great firms, where some take the business of one customer and some that of another, it happened that Mr. *Wood* attended principally to any matters of business which the Plaintiff had to transact with the firm. Towards the end of 1847 the Plaintiff, it seems, entertained doubts whether the


(a) See on this point the Judgment.


1854.  
BISHOP  
v.  
COUNTESS OF  
JERSEY  
and Others.

1854.  
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 Bishop  
 v.  
 Countess of  
 Jersey  
 and Others.

security of *Dutch* bonds was sufficient, and consulted Wood upon it; Wood told her he thought they were a safe security, however he recommended her to sell them and invest on other securities, representing to her that an opportunity then offered for obtaining for her better interest on a safe investment: she accordingly gave a direction to have the bonds sold. [The first document, set out in p. 155.] Now the complaint made is not about selling the *Dutch* bonds, for the money produced by that sale, about 5,000*l.*, came safely into the hands of the bank, and was duly credited by them to the Plaintiff. There was then a later conversation between Wood and the Plaintiff, in which Wood, as she states, represented that he could lay out for her 5,000*l.* on good security. From her cross-examination it appears that Wood represented, and the Plaintiff well understood, that the person who wanted the money was Wood's own son. Nothing, it seems, was then said about *Jacobus*: all she knew was that Wood represented that the lending of the 5,000*l.* would be to his own son. She suggested the propriety of consulting her friends: but she yielded to the reasoning of Wood against her doing so. Now the facts referred to in the evidence on that point no doubt show a great fraud upon her on the part of Wood: Wood evidently designed to get the money lent to his own son, without any, that is, without any proper, security: and he misled her. At his suggestion she signed and delivered to him a cheque for 5,000*l.*, which he prepared, and the bankers cashed it in the ordinary course. [His Honor then referred to the cheque for 5,000*l.*] On this it has been observed, that it was made payable to *Jacobus*; I think it quite immaterial to whom it was made payable, as it was a common cheque payable to bearer. Now, so far the bankers had done nothing wrong, they had done their ordinary and regular duty as bankers.

But then it is said that she was induced by fraud to give the cheque by which the 5,000*l.* was drawn out; that she was led to draw it by *Wood's* fraudulent representations; and that as those representations were made by one of the partners of the bank, at the bank, and he was consulted by the Plaintiff as one of the partners, therefore, it was a transaction in respect of which the other partners were liable. Now, taking the Plaintiff's own evidence, and without pressing too much on the circumstance of its being the party's evidence in her own favour, what is the fair inference to be drawn from that evidence? [His Honor referred to the evidence on the subject of what passed between the Plaintiff and *Wood* as to the security.] Now if that is considered, it must lead to one or other of these two theories. Either that *Wood* said in express terms (which is wholly improbable), "I am recommending to you this investment as a partner and on behalf of the firm;" or, secondly (and this is the supposition that I adopt), that the Plaintiff, without any thing expressly said on the part of *Wood*, being unaccustomed to business, took it for granted, the conversation taking place, and *Wood's* representations being made to her, in the rooms of the banking house, that what was said came as from the bank. That, I think, is the fair inference from her evidence. There is another inference which I draw from it without feeling any doubt, viz., that *Wood* never said that he undertook to find her some good investment generally, without mentioning what. She was not led to suppose that; she knew that the person for whom the money was wanted was, not the government, nor the Bank of *England*, but Mr. *Wood's* own son. She knew perfectly well that *Wood* was recommending, not an investment in the funds, nor generally any safe investment, but a particular investment in the hands of

1854.  
  
 BISHOP  
 v.  
 COUNTESS OF  
 JERSEY  
 and Others.

1834.  
  
 BIANOR  
 v.  
 COURTESY OF  
 JESSEY  
 and Others.

Wood's own son. No doubt she expected a good security would be given by Wood's son; and when Wood gave her the son's promissory note, and endorsed on the back of it his own guarantee, and gave her the policy of assurance, he no doubt gave her those documents meaning her to suppose, as she did suppose, they were a good security; and undoubtedly he committed a great fraud upon her.

But Wood's recommendation could not have been reasonably understood to be on behalf of the firm. How can I suppose any one could reasonably consider that when a partner in a bank receives the customer's money, by means of the customer's cheque, and recommends it to be laid out on a loan to his own son, such recommendation is made on behalf of all the partners? Can I, because the Plaintiff chose so to deal, hold the Defendants liable on the ground that the representations of Mr. Wood were understood by her to be made on behalf of the firm? Or how can the circumstance that the person, to whom the cheque was delivered, induced the drawer by fraud to deliver it to him, make the bankers who paid it liable? I do not think it has that effect, although that person was a *bona fide* partner.

Then it is said that it is the practice of bankers generally to invest the money of their customers for them. But it is notorious that their practice is not to act for their customers as money servants to agents generally, to find investments for the money — but if a customer sends them with a power of attorney, a letter of instructions directing them to sell a particular sum of stock, they will do so; or if the customer wishes a particular investment in the funds and directs them to lay out his money in the purchase of particular stock, and direct him

with the amount, they will do so; and when they do, be it observed, they do so ordinarily without a cheque, but on a particular letter of instructions. But how does that practice apply to this case?

It is not within the scope of the business of bankers to seek or make investments generally for their customers.

Then it is argued, that if the transaction was beyond the scope of the business of the defendants as bankers, still they had notice of it, and it was their duty to prevent it. [His Honor read the evidence on this point.] Now, so far as this evidence goes, it is an admission by a person not a partner at the time, and an admission, not that the partners knew of the transaction at the time it took place, but that "some of their people" knew of it before *Wood* absconded. This affords no inference that any partner knew of it before the absconding. Besides, what is it that was known? Why, that *Wood* had induced the Plaintiff to lend money to his son. Even if some of the firm knew that the Plaintiff had lent the money to *Wood's* son, there is no evidence that it was known to any body at any time what were the representations that *Wood* had made. It appears to me that there is no ground for assuming that the partners knew anything at all about the transaction at the time it took place; and there is nothing to show that they knew anything till after *Wood* had absconded: I cannot say, at least, that they so knew of the transaction as to make it their business to interfere.

With regard to the cases cited, *Sandilands v. March* does not come nearly up to this case. In that case it was the regular practice of the firm to do the business

1854.  
BISHOP  
v.  
COUNTESS OF  
JERSEY  
and Others.

1854.  
BISHOP  
v.  
CORNTHES OF  
JERSEY  
and Others.

that was done. The ground of the decision was, however, that even assuming the investment of the money in the purchase of annuities to be *ultra* the general scope of their business, yet, inasmuch as the investment was made by the firm, all the partners were liable. Nor does *Sadler v. Lee*, nor *Blair v. Bromley*, come up to this case. In the latter case, the firm was in the habit of acting as money scriveners, and the business was done by the firm. None of the cases cited, indeed, go beyond this, that to make the partnership generally liable, the business must be within the scope of its ordinary business, or be conducted through the instrumentality of the firm.

His Honor then commented on the entries in the Plaintiff's account of the two half-yearly payments of interest, as paid in by *Jackman*, which he was of opinion had no effect as against the Defendants, and concluded by stating that he decided the case without any doubt whatever.

The bill was dismissed with costs: *Lady Jersey*, however, by her counsel, waiving her costs.

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VAUGHAN v. VANDERSTEGEN.

1853:  
15, 16, 17 & 22  
Dec.

**T**HE principal question for determination on the hearing of these causes on further directions, was whether, in the case of a married woman having a general power of appointment by will, and exercising that power, the appointed property is applicable to the payment of her debts or engagements in the nature of debts.

*Feme Coverté.  
Separate Estate.  
General Power  
of Appointment  
by Will.*

The facts were as follows:—

By a settlement made on the marriage of Miss *Hussey* with her first husband, Mr. *Vaughan*, dated the 27th April, 1831, and a subsequent deed of revocation and new appointment dated the 26th April, 1837, certain freehold and leasehold estates and personal property (all belonging to her) were conveyed and assigned to trustees. The trusts of the freehold estates were, during the life of Miss *Hussey*, to pay the yearly rents and profits to such persons and for such purposes as she, notwithstanding the then intended or any future coverture, should by writing (but not by any mode of anticipation) appoint; and in default of appointment, into her proper hands for her separate use, independently of her then intended or any future husband, and upon her single receipt for the same; and after her decease, the freehold estates were to be in trust for such persons and for such purposes as she should by will, attested by three witnesses, notwithstanding coverture, appoint; and in default of appointment, in trust for her (Miss *Hussey*), her heirs and assigns, and so that her intended husband should not be

A married woman having a life estate in personality to her separate use, with a general power of appointment by will, does not, by exercising that power, make the property applicable to the payment of her engagements in the nature of debts, viz., of such engagements as would be charges on her separate estate.



1853.  
  
 VAUGHAN  
 v.  
 VANDER-  
 STEEN.

tenant by the curtesy. The trusts of the leaseholds were the same as those of the freeholds, except that, in default of appointment by her will, the leaseholds were to be in trust for all the children of the marriage who, being sons, should attain twenty-one, or die leaving issue, or, being daughters, should attain twenty-one or marry. The trusts of the personalty were in all respects the same as those of the leaseholds.

Mr. *Vaughan* died in 1838, leaving Mrs. *Vaughan* and two children of the marriage him surviving.

Mrs. *Vaughan*, being a widow, made her will, dated 30th July, 1839, whereby she exercised her general powers of appointment as to the freeholds, leaseholds and other personal property, chiefly in favour of her two children.

On the 27th August, 1842, Mrs. *Vaughan* married Lord *Dundague*, and on that occasion a settlement was executed, dated 25th August, 1842, whereby Mrs. *Vaughan* assigned to trustees all the personal estate which she was then possessed of or entitled to except a certain sum of £2000, upon the following trusts, viz., upon trust for such persons and for such purposes, and in such manner as Mrs. *Vaughan* by any writing under her hand or by her last will and testament should, whether covert or sole, direct, limit or appoint; and in default of appointment, in trust for Mrs. *Vaughan* during her life, for her separate use, and for that purpose to permit and suffer her to receive and take the interest, dividends and annual produce of such of the trust premises as produced interest, dividends or annual produce, and otherwise to permit her to have, hold, order, manage, let and dispose of all or any of the said respective trust pre-

mises during her life in such manner and as fully and effectually to all intents and purposes as if she were a feme sole; and from and after her decease, in case no such direction, limitation or appointment, gift, bequest or disposition should be made by her, upon certain trusts for the benefit of her children, whether by Mr. *Vaughan* or by Lord *Dunboyne*; and if no child should become entitled under those trusts, in trust for the survivor of Mrs. *Vaughan* and Lord *Dunboyne*. And there was a covenant by Lord *Dunboyne*, that any property to which Mrs. *Vaughan* should become entitled during the marriage should be settled on the same trusts.

This settlement did not affect the property comprised in the settlement of 1831.

For some reason, which is not apparent, the marriage of 1842 was concealed, or was treated by the parties as if it was invalid (although it has now been found to have been a valid marriage), and Mrs. *Vaughan* continued to pass under that name, and to act and deal as if she were the widow of Mr. *Vaughan*; and on the 19th December, 1843, another marriage ceremony was performed between her and Lord *Dunboyne*, and another settlement dated 16th December, 1843, was executed, which was substantially to the same effect as that of August, 1842.

In March, 1843, Lady *Dunboyne*, acting under the name and description of Mrs. *Vaughan*, widow, borrowed 4,500*l.* of *George Gates*, and to secure the repayment thereof, she executed to him a mortgage, or what purported to be a mortgage, of some property, dated 7th of March, 1843; and the mortgage deed contained the common covenant by her for repayment of the money. As she was then a married woman, this transaction was

1853.  
VAUGHAN  
v.  
VANDER-  
STEGEN.

1853.  
  
 VAUGHAN  
 v.  
 VANDER-  
 STEEN.

admitted by *Gates* to be void as a mortgage; but he claimed to be a creditor of Lady *Dunboyne* under the covenant.

Mr. *Waugh* also claimed to be a creditor of Lady *Dunboyne* under a similar transaction, dated 24th June, 1843. And Mr. *Allaway* also claimed to be a creditor of Lady *Dunboyne*, by virtue of a bond for 100*l.* dated 13th February, 1836, under the hands and seals of Mr. and Mrs. *Vaughan*. These three persons claimed to be creditors by specialty; other persons claimed to be simple contract creditors of Lady *Dunboyne*, partly for money lent to her, partly for goods sold and delivered, and partly for work and labour done. The dates of the transactions with these simple contract creditors did not appear, but it was assumed that they took place after the marriage in August, 1842.

Lady *Dunboyne* died on the 8th December, 1846.


With respect to the freehold estates comprised in the settlement of 1831, it was assumed in argument, and the Court thought there was no doubt, that, by the Wills Act, 1 Vict., c. 26, sect. 18, the will made by Mrs. *Vaughan*, in 1839, was revoked by her marriage with Lord *Dunboyne*, so far as related to those freehold estates, inasmuch as those estates would, by virtue of the limitations of the settlement, pass to her heir in default of appointment. With respect, however, to the leaseholds and other personal estate, which by the limitations of the settlement would not, in default of appointment, pass to her executor or administrator, or the person entitled as her next of kin under the Statute of Distributions, the Master had found that the will was not revoked by the marriage, and that was not questioned. No one has im-

pugned that finding; and the Court did not see any reason to question its correctness.

The persons who claimed to be creditors of Lady *Dunboyne*, insisted that the Court ought to apply to this case that principle of equity, by which property which has been appointed to volunteers in exercise of a general power of appointment, is made available to the payment of the appointor's debts; and they claimed to be paid their debts out of the leaseholds and other personal property comprised in the settlement of 1831, which was appointed by the will of Mrs. *Vaughan*.

Mr. *Daniell* for the Plaintiff, one of the children, and the heir-at-law of Lady *Dunboyne*.

The question is, what is the effect of the execution by Lady *Dunboyne* of her power of appointment over the personal estate, the subject of the power? *Gates* and the other creditors will say that the general power of Lady *Dunboyne* having been exercised, those who take under it, take subject to her debts; that she has made the property her assets. To that proposition I answer, 1stly; that doctrine does not apply to a power of appointment in a married woman; 2ndly, the persons taking under the appointment, are not volunteers, as they must be to let in the operation of the rule. The appointment by the will is in favour of the children; if the power had not been exercised, they would have been purchasers under the settlement. Now, the power being exercised only to the extent of distinguishing between the objects of the power, that does not make them volunteers. The reason of the rule on which the other side relies, is that the donee takes the fund appointed, as bounty. The next question is, has the appointment made by Lady *Dunboyne*, so made the property her own, that the chil-

1833.  
  
 VANDER-  
 HART  
 v.  
 VANDER-  
 HART.

dren cannot take without paying her debts. Now we say that the rule does not apply to a general power of appointment by *will* only. Secondly, if it does so, then the power, to bring the case within the rule, must be exercised in favour of persons not within the consideration of the settlement.

Where there is a general power of appointment by deed or will, so that the donee can in his lifetime make the property absolutely his property, and thus make it available for the benefit of his creditors, the parties, originally objects of the settlement, have no ground of complaint if he so appoints, because their interest was, by the very settlement itself, made subject to destruction in that event.

Those who take under the appointment as mere volunteers have, of course, no claim except to a bounty.


But that rule does not apply when a power is limited. Besides, the power must be fully exercised. But when a power is exercised, not as a general power to give, but only as a power of distribution, does that exercise of a power fall within the rule? What is to prevent those parties who are minors from rejecting the gift with its alleged consequences and taking under the limitations in default of appointment, when their interest would clearly not be benefited?

*See also* *James v. Earl of Dartmouth*, *Windsor v. Barrington*, *Ward v. Barrington*, *Emmerson v. Emmerson*, &c., to show that the power must be exercised, in order to make the issue of the nature of the power immaterial.

*See also* *Windsor v. Barrington*, *Ward v. Barrington*, &c.

*See also* *Windsor v. Barrington*, *Ward v. Barrington*, &c.

purpose of letting in his creditors. He cited also *Jenney v. Andrews* (a).

1853.  
  
 VAUGHAN  
 v.  
 VANDER-  
 STEGEN.

Clearly the children may elect to take by the settlement instead of under the appointment; and if they did, their interest would be paramount to the appointment.

Mr. *Greene* with him.

It is admitted that *Gates* is only a general creditor. The power is a power to appoint only by will; that is very distinct from a general power, under which the donee may obtain the absolute enjoyment of the property. Under such a power as this he cannot: *George v. Millbanke* (b). Besides, this is the case of a feme covert; at law she can have no debts; she has no estate whatever, except in this Court: she is not to be put upon the same footing as a person *sui juris*; quoad the appointed fund, she had, and could have, no creditors: *Owens v. Dickinson* (c). In *Hughes v. Wells* (d) there was a dictum, but no decision.

Mr. *Wilcock* and Mr. *Faber* for *Harvey* and his wife, the other child of Lady *Dunboyne*.

Lady *Dunboyne* had separate estate, viz., the arrears of rent due to her. She had personal estate, over which she had a power of appointment by will, and also real estate, which she had power of appointing by will. Now, either you must treat the case of a married woman as distinguishable from the case of a person *sui juris*, having such a power of appointment, or you must treat her as on the same footing. And then you must carry the doctrine the length of treating the property throughout as the assets of the married woman: you must treat her real

(a) 6 Madd. 264.

(c) 1 Cr. & Phil. 48.

(b) 9 Ves. 190.

(d) 9 Hare, 749.

1853.  
  
 VAUGHAN  
 v.  
 VANDER-  
 STEGEN.

estate descended as assets for payment of her debts, and then that real estate must be applied before the appointed personalty, in payment of her debts. They referred to 2 *Sug. Pow.* (a)

The principle of the rule on which the other side rely is this : that a person who has a general power of appointment, has the power of making the property his own, and that he shall not be allowed to do that without paying his debts. But that does not apply to the case of a married woman. Suppose she had appointed the property to her executor; that could not make it assets for the payment of her debts, unless it was her separate estate. However, if it does so, then we say, on the same principle, real estate descended must be assets, and her debts must be paid out of that, before resorting to the appointed personalty.

Mr. *Baily* for *Gates*, the creditor.

It is said there was no power in Lady *Dunboyne* to make the property her own, because she had only a power to appoint by *will*.

But there is no such distinction as that. Suppose a power to appoint by deed or will, and the power to appoint by deed not exercised, the power to appoint by will would not lose its efficacy. The question does not depend upon any such distinction. The course of the Court is, whenever a person has a general power, by which he *could* make the property his own, he shall, if he has exercised it at all, be treated as exercising it so as to make it his own for the purpose of paying his debts. He cited *Thompson v. Towne* (b); *Heatley v.*

(a) Page 20, 6th ed.

(b) 2 Vern. 319.

*Thomas (a); Jenney v. Andrews (b); Petre v. Petre (c), and Nail v. Punter (d).*

Mr. *Smythe* with him.

First, the real estate descended is liable. Where a married woman who has separate estate, contracts debts, her real estate, which she allows to descend, is made liable by the 3 & 4 Will. 4, c. 104. It is admitted that, as to Lady *Dunboyne's* purely separate estate, the execution of the power would make it subject to her debts. But it is said it does not as to the fund subject to be appointed. But what is separate estate? Is not that fund as much so as the arrears of rent? Separate estate depends simply on the exclusion of the husband's right of interference, and nothing more. Here the power of appointment, which was to be exercised to the exclusion of all right of the husband, was as much separate estate as Lady *Dunboyne's* life estate, and the fund appointed therefore is liable as her separate estate. Everything that she can dispose of, exclusive of her husband's power, is her separate estate.

On the 22nd December Mr. *Greene* replied.

The power in this case is a mere testamentary power, incapable of creating any estate which can take effect during the life of the donee.

We must first distinguish between such a power vested in a person *sui juris*, and the same power in a married woman. [The learned counsel commented on *Thompson v. Towne* and the other three cases.] In *Thompson v. Towne* and in *Petre v. Petre* the donee was a man; besides, in *Thompson v. Towne* the property became the

(a) 15 Ves. 596.

(b) 6 Madd. 264.

(c) 14 Beav. 197.

(d) 5 Sim. 555.

1853.  
VAUGHAN  
v.  
VANDER-  
STEGEN.



1833.  
  
 VARNAN  
 v.  
 VANDER-  
 STOEK.

assets of the donee for reasons quite independent of the exercise of the appointment: it was actually part of the donee's own property. In *Heatley v. Thomas* the same kind of observation is applicable. The question there was, did the instrument confine the power to be exercised by will, and the Court considered the donee had a general power of appointment by deed or will. She could have, therefore, made the property her own separate estate during her life. It is now well settled that a life estate, with power to appoint by will only, does not give an absolute estate: *Hixon v. Oliver* (a); *Doe v. Thorley* (b); *Archibald v. Wright* (c). These cases I refer to, to show the distinction between property and power.

*Jenney v. Andrews* is a mere *dictum*. In *Petre v. Petre* there was no question raised whether the execution of the power by will created assets. Besides there the donee had, by revoking the uses of the settlement, made the property his own: and then his will operated as a will of his estate, not as an exercise of the power. Even, therefore, as regards a mere power to appoint by will vested in a person *ex parte* it is not clear that the exercise of such a power creates assets. But if that were so, this is the case of a married woman, which is very different. In *Clown v. Anderson*, the trustees themselves were the appointees: they did not make it as trustees, they were trustees in fact, but they were also appointees: and it was on the ground of the change in their favour that they were let in. Now with regard to such a power in a married woman, could the Court say, let her exercise it? There is no authority for saying that it would. She cannot contract to exercise it, and

(a) 10 Ves. 391. (b) 10 Ves. 391. (c) 10 Ves. 391.

therefore cannot be ordered to do so. He cited *Reid v. Shergold* (a); *Francis v. Wigzell* (b); *Hulme v. Tenant* (c). In these cases the Court considered there was no power to anticipate the exercise of a testamentary power to appoint. A married woman cannot make any *contract*, in fact, beyond her separate estate. The existence of a separate estate must *precede* the contract. How, then, can she bind estate which can only be converted into her estate, if it can be so at all, by her will?

1853.  
VAUGHAN  
v.  
VANDER-  
STEGEN.

*Nail v. Punter* (d), which has been referred to, goes far beyond any authority to be found in the books, if the Vice-Chancellor meant what is there attributed to him; but the Vice-Chancellor appears to have thought there was a resulting trust in the nature of separate estate, and that probably was the true ground of his decision. A married woman never could reduce the property over which she has a mere testamentary power, into a state of enjoyment: she cannot bind it by any *contract*. It is not separate estate, because separate estate implies coverture, and cannot exist without it. How, then, can there be separate estate after the severance of the coverture?

On the effect of Sir *J. Romilly's* act, referred to by Mr. *Smythe*, that act does not apply to the property of a married woman. The state of the law before the act shows that the intention of the act was merely to carry out contracts as against *heirs*, not to make anything assets by *contract* which was not so before.

None of the cases cited on the other side have anything to do with the question of the effect of creation of

(a) 10 Ves. 370.

(c) 1 Br. C. C. 16.

(b) 1 Madd. 258.

(d) 5 Sim. 555.

1853.  
  
 VAUGHAN  
 v.  
 VANDER-  
 STEGEN.

a power, except *Owens v. Dickenson*, with which I have dealt. They were all cases on admitted separate estate and its liabilities. But the question is here whether the property appointed is separate estate.

To sum up. 1. The cases cited have reference only to the administration of separate estate, not to the question what creates separate estate.

2. There can be no liability in a married woman, except in reference to separate estate; it cannot go beyond that.

3. The intention of such a power as this, is not to create separate estate; the married woman cannot in any sense acquire under it the enjoyment of separate estate; and she cannot make it separate estate after her death; and no case has extended the jurisdiction over the acts of married women so far as is asked in this case.


The Court took time to consider; and, on the 23rd February, 1854, the VICE-CHANCELLOR delivered judgment. After stating the facts and the claims of the creditors, his Honor proceeded thus:—

*Judgment.* The appointees resist this claim on several grounds.

1st. They insist that the principle is not applicable, even in the case of a man, where (as in the present case) the power is only to be exercised by will, and not by deed.

No authority whatever is adduced in support of this proposition. It is admitted that if the power authorizes

its being executed by deed or will, and the donee exercises it by will, the principle will apply. Now, it is not the mere possession of the power, but the exercise of the power, which can ever give occasion to the application of the principle; and if it will be applied at all where the power is exercised by will, I do not see what difference it can make whether the power did or did not authorize its exercise by deed as well as by will.

1853.  
  
 VAUGHAN  
 v.  
 VANDER-  
 STEGEN.

In *Jenney v. Andrews* (a) the very case was presented of an appointment by will under a general power, which, by the terms of its creation, only authorized the donee to exercise it by will. It does not seem to have occurred to the counsel for the appointees to argue the point now insisted upon; the only question argued was, whether among the creditors of the appointor, whose debts were to be paid out of the appointed fund, creditors, who were such at the time of the bankruptcy of the appointor, should be included. Sir *J. Leach*, Vice-Chancellor, expressed himself in these terms: "Where there is a general power of appointment by will, and an appointment is made, the appointee is a trustee for creditors; but it is not for creditors at the time of the execution of the will, but at the death of the testator." This declaration of Sir *J. Leach's* opinion would be sufficient authority for me, even if I had any doubt upon the point.

The second ground upon which the appointees insist is this, that whereas the principle applies only where the appointment is made in favour of volunteers, in the present case the appointees are not volunteers, because they are not strangers to the settlement, but the children, who, by its provisions, are to take in default of appointment.

(a) 6 Madd. 264.

1853.  
 ~~~~~  
 VAUGHAN  
 v.  
 VANDER-  
 STEGEN.


It appears to me that this contention is altogether founded on a misconception of the term "volunteers" as used with reference to persons in whose favour an appointment is made under a general power. Every one in such case is a "volunteer" to whom or in whose favour the appointor is under no obligation to appoint the property. The interest given by the settlement to the children, in default of appointment, is one thing; the interest which they take by virtue of the appointment is another and a very different interest; and though it is true that they are not volunteers with respect to the former, yet that interest is destroyed by the execution of the power, and the interest which they take under the appointment they owe to the voluntary act and bounty of the appointor; and in respect of this latter interest they are mere volunteers, just as much as any strangers would be in whose favour the donee of the power might have thought fit to exercise it.

The third ground taken by the appointees is this: that as the equitable principle in favour of creditors does not apply to the case of a limited power, though exercised, nor to the case of a general power unexercised, it ought not to apply to the case of a general power, when only exercised to a limited extent, which it is said is the case here. By the term "limited power" I presume is meant a *special* power, i.e., a power to appoint to special objects: and by the term "exercised to a limited extent" must be meant *exercised in favour of special objects*. If such be not the sense in which it is intended to employ those terms, I have failed to apprehend the argument. The children, then, in whose favour the appointment is made, are thus assumed to be *special objects*. Special objects of what? Not special objects of the power: for if that were so, the power would not be a general, but a special power. The only sense in which

they can be called special objects is, that as the settlement gives them an interest in default of appointment, they are so far, and to the extent of that interest, special objects *of the settlement*, if the power be not exercised. But the settlement itself provides that the very interest in respect of which alone they are to be regarded as special objects of the settlement will be destroyed if the power be exercised; and they are not special objects *quoad* the appointment to be made in exercising it, because the appointment may be made in favour of any object whatever, without restriction.

The fourth point insisted upon by the appointees is, that the equitable principle in favour of creditors does not apply to the case where the appointor is a married woman, because she cannot contract debts, and the appointed property does not, by the effect of the appointment, become settled to her separate use. This argument renders it necessary that I should consider the question whether a married woman, who, by the fixed general rule of law is incapable of contracting debts, is regarded by Courts of Equity as being to any, and what extent, capable of so doing.

Although, from an early period, Courts of Equity had so far departed from the settled rules of law with respect to a feme covert, as to admit of property being settled in trust for her separate use, and had established the principle that, with respect to the property so settled, she should be considered a feme sole, *quoad* the capacity of enjoying and the capacity of disposing of that property, it is remarkable how long and steadily they refused to grant to her the other capacity of a feme sole, that of contracting debts. It might very reasonably be considered that consistency required that she should have that

1853.  
  
 VAUGHAN  
 v.  
 VANDER-  
 STEGEN.

1853.

VAUGHAN  
v.  
VANDER-  
STEGEN.

capacity to the same limited extent to which she was constituted a feme sole; although to have extended her capacity of contracting debts beyond that limit would have been clearly a violation of all principle. But so deeply were Courts of Equity impressed with the propriety of adhering to the rule of law by which a married woman is incapable of contracting a debt, that they would not recognize in her the capacity of doing so at all, not even to the same limited extent to which they had constituted her a feme sole. After a time, however, being pressed by the injustice of allowing her, after having deliberately and solemnly entered into an engagement for the payment of money, to continue in the enjoyment of her separate property without paying her creditors, the Courts at first ventured so far as to hold, that if she made a contract for payment of money by a written instrument with a certain degree of formality and solemnity, as by a bond under her hand and seal, in that case the property settled to her separate use should be made liable to the payment of it; and this principle (if principle it could be called) was subsequently extended to instruments of a less formal character, as a bill of exchange or promissory note, and ultimately to any written instrument. But still the Courts refused to extend it to a verbal agreement or other common assumpsit, and even, as to those more formal engagements which they did hold to be payable out of the separate estate, they struggled against the notion of their being regarded *as debts*, and, for that purpose, they invented reasons to justify the application of the separate estate to their payment, without recognizing them as debts or letting in verbal contracts. One suggestion was, that the act of disposing of or charging separate estate by a married woman was in reality the execution of a power of appointment, and that a formal and solemn instrument in writing would operate as

an execution of the power, which a mere assumpsit would not do. The fallacy of this reason has been repeatedly exposed; and it has been truly observed, 1st, that it confounds two things which are quite distinct in their nature, power and separate use; 2ndly, that even supposing the act of disposing of separate estate by a married woman to be regarded as the execution of a power, the reason assigned violated the principle long established with respect to powers, that a power could not be executed by an instrument which did not refer either to the power itself or to the property which was the subject of it; and 3rdly, that if there be several of such instruments, and they are to be regarded as successive executions of a power, the appointees would rank in the order of the dates of the appointments, whereas it is held, that where the persons claiming under such instruments are let in upon the separate property of the party executing them, they must stand *pari passu*. Another reason suggested was, that as a married woman has the right and capacity specifically to charge her separate estate, the execution by her of a formal written instrument must be held to indicate an intention to create such special charge, because otherwise it could not have any operation. To this it has been (as, I think, conclusively) answered, 1st, that the same reason would apply with precisely equal force to any, even a verbal, assumpsit or promise; 2ndly, that it was against all principle that a specific charge on any given property should be created by an instrument which did not contain the slightest reference to that property; and 3rdly, the last of the before-mentioned objections to a written contract by a feme covert being treated as the execution of a power, applies equally to its being treated as a specific charge; for if it were a specific charge, the persons in whose

1853.  
  
 VAUGHAN  
 v.  
 VANDER-  
 STEGEN.



1853.  
  
 VAUGHAN  
 v.  
 VANDER-  
 STEEN.

favour such charges were made, must rank in the order of their successive charges, and not *pari passu*.


The inconsistency of drawing this distinction between the different engagements of a married woman having separate estate, with reference to the different forms in which they are contracted, together with the unsatisfactory character of the reasons assigned to justify such distinction, has forced itself more and more on the attention of successive judges; and a growing tendency has been manifested to adopt a more consistent view, by holding, 1st, that *to the same extent* to which a married woman is, by Courts of Equity, constituted a feme sole, with respect to the capacity of enjoying and the capacity of disposing of property, she ought also to be regarded as a feme sole with respect to the capacity of contracting debts, or engagements in the nature of debts; and 2ndly, as a corollary of the former, that all such debts or engagements should stand on the same footing in whatever form contracted. I refer to the observations of Sir Thomas Pender, Master of the Rolls, in *Coxon v. Wiles*, mentioned in a note to 1 *Suppl. Poor*, (a) those of Lord Brampton, in *Murray v. Barker*, (b) and particularly to those of Lord Cottenham, in *Coxon v. Dickinson*, (c). In the latter case, Lord Cottenham, after showing that the reasons formerly assigned for making the separate property of a married woman liable to her various engagements, viz., that they should be regarded as executions of a power, or as specific charges, were not tenable, proceeds in these words: "The view taken of the matter by Lord Thurlow in *Holme v. Tynte* is more correct. According to that view, the separate property of a married woman, being a

(a) Page 206.

(b) 10 Craig & Pl. 48.

(c) 5 Myl. & K. 206.

creature of equity, it follows that, if she has a power to deal with it, she has the other power *incident to property* in general, namely, the power of contracting debts *to be paid out of it*; and, inasmuch as her creditors have not the means at law of compelling payment of those debts, a Court of Equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property as the only means by which they can be satisfied." And in a subsequent passage he says, "I observe that, in *Clinton v. Willes*, Sir Thomas Plumer suggested a doubt whether it was necessary they should be secured by writing; and it certainly seems strange that there should be any difference between a contract in writing, when no statute requires it to be in writing, and a verbal promise to pay. It is an artificial distinction not recognized in any other case. On that point, however, I give no opinion at present."

1853.  
  
 VAUGHAN  
 v.  
 VANDER-  
 STEGEN.

It may, therefore, I think, be considered to be now the doctrine of this Court, that the engagements and contracts of a married woman having property settled to her separate use, at least such of them as are in writing, are to be regarded as debts, or in the nature of debts, and that her property so settled is liable to the payment of them as such, and that this principle is entirely founded on the doctrine of Courts of Equity, by which she is constituted a feme sole as to that separate property. It has not yet, indeed, been made the subject of positive decision that the principle embraces her verbal engagements or cases of common assumpsit; and, in the seventh edition of Lord *St. Leonards'* work on Powers, published in 1845 (a), his lordship observes (though without referring to *Murray v. Barlie* or *Owens v. Dickenson*) that the prevailing opinion then was, that her separate estate was not liable

(a) 1 Sugd. Pow. 206.


1853.  
 ~~~~~  
 VAUGHAN  
 v.  
 VANDER-  
 STEGEN.

to general demands upon her. Considering, however, the opinions I have referred to, and the reason of the thing, I think it very probable that when that question arises for decision, it will be decided in the affirmative.

I must observe, however, that a contract for the payment of money made by a married woman having separate estate, though called a debt, is only a debt *sub modo*. When compared with the debt of a feme sole or a man, it lacks most of the qualities of a debt. It cannot be enforced against her person either at law or in equity: even in a Court of Equity it cannot be enforced against property, real or personal, held generally in trust for her; and though she is of course a necessary party to a suit to enforce it as against property held in trust for her separate use, the suit must be against the trustees in whom that property is vested; and the decree cannot go against her to pay it, but only against the trustees to compel them to pay it out of the separate estate. If she should survive her husband, although the creditors may have the right in equity still to enforce the payment of the debts contracted during coverture out of any remaining estate or interest which was settled to her separate use, yet her person and her general property remain as completely exempt as before from all liability, and she could not be sued for it at law, notwithstanding her having become discovert.

But in whatever sense the contracts or engagements for the payment of money, entered into by a married woman having separate estate, may be called debts, or to whatever extent they possess the characteristics of proper debts, this at least appears to me perfectly clear,—that as her capacity to contract them exists only by reason of her being, to a certain limited extent, clothed

by Courts of Equity with the character of a feme sole, their efficacy as debts must be confined within the same limits which circumscribe her character of a feme sole; that is, within the limits of the particular property which is expressly settled in trust for her separate use. To give effect to them as debts to the extent of those limits, would be consistent with the principle upon which she is constituted a feme sole, and rendered capable of contracting them; to give effect to them beyond those limits, would be a violation of all principle. Is then a married woman, in the view of Courts of Equity, a feme sole with respect to a general power of appointment of which she is the donee? Or, to express the same question in different words, is a married woman held, even by Courts of Equity, to possess the capacity of executing an express power of appointment, on the ground that the property comprised in the power stands settled to her separate use? Clearly not. The capacity of a married woman to execute a power of appointment, and to appoint the property which is the subject of the power, is not the creature of Courts of Equity, but is equally recognized by Courts of Law, and was so before the doctrine of separate use was established. Thus (to put the case of a legal power), if real estate be limited *to the use* of *A.* for life, with remainder *to such uses* as *B.*, a married woman, shall by deed or will appoint, a Court of Law, which knows nothing about separate estate, holds her capable (though a married woman) of executing this power, and gives effect to the estates created by her execution of it. And so it does, if the estate be limited to the use of trustees, during the life of a married woman, in trust for her separate use, with remainder to such uses as she shall by deed or will appoint. And it makes no difference whether the limitation in default of appointment is to herself or to a stranger. And so when the


1853.  
  
 VAUGHAN  
 v.  
 VANDER-  
 STEGEN.

1858.  
  
 VAUGHAN  
 &  
 VANDERKAM.  
 ATTORNEYS.

*equitable* interest in any property, of which the legal estate is vested in trustees, is limited to such persons and for such purposes as a married woman shall by deed or will, or by will alone, appoint, although a Court of Equity can alone take cognizance of it, as being matter of trust, that Court recognizes and maintains her capacity to exercise such power, and gives effect to the estates and interests created by her execution of it, not by virtue of, or with reference to, the doctrine of separate use, or any other doctrine peculiar to equity, but simply because in this respect equity follows the law, and does, with respect to the equitable estate, just what a Court of Law would do if the power was a legal one. Thus, if property be vested in trustees, in trust during the life of a married woman to pay the income to her for her separate use, and after her death in trust for such persons and in such manner as she shall by will appoint, although a Court of Equity deals with the *life estate* with reference to its own peculiar doctrine of separate use in a married woman, giving her the power or capacity to dispose of the life interest as if she were a *feme sole*, yet with respect to the *remainder* from and after her death, it does not deal with that on the footing of any such doctrine; it does not regard the power as a trust for her separate use, nor does it recognize her capacity to exercise it on the ground that she is constituted a *feme sole* in respect of it. But it holds her to be capable of executing the power and gives effect to the estates and interests created by its execution, upon the same grounds and principles as govern Courts of Law with respect to legal powers. In fact, it treats the matter with respect to the *remainder*, which is the subject of the power, exactly as it would do if the trust of the life estate instead of being limited to be for her separate use, was expressed to be for the married woman generally without any mention of separate

rate use; or as it would do if the trust of the life estate was declared in favour of a third person. It is true that a general power of appointment, given to a married woman, enables her to dispose of the property by her own sole and separate act, independently of her husband; and in that one point it bears a resemblance to a trust for her separate use; but it is not on that account the same thing as a trust for her separate use. Indeed, how can it be the same thing as a trust for her separate use, when a Court of Law, which is a perfect stranger to the doctrine of separate use in a married woman, recognizes it, if the power be a legal one, and enables her to exercise it as fully and effectually as a Court of Equity. In truth, the difference between a trust for the separate use of a married woman, and a power of appointment given to a married woman, is neither more or less than the well established difference between property and power. The former is her property, with the incidents of property; the latter is merely a power, and not her property. It stands in that respect upon precisely the same footing as the case of a feme sole having a life estate, with a general power of appointment over the reversion or remainder by her will.

It will be observed that the foregoing observations have reference to the case where the power affects the reversion, while the trust for separate use affects the life estate; that is, where the estate or interest which is the subject of the power is different from that which is the subject of the trust for separate use. But the same distinction between a power and a trust for separate use equally exists where the same estate or interest is the subject of both. If property is vested in trustees in trust during the life of a married woman to pay the income to such persons as she shall appoint, and in default of appointment to pay the income to her for her separate use

1853.  
  
 VAUGHAN  
 v.  
 VANDER-  
 STEGEN.

1853.  
  
 VAUGHAN  
 v.  
 VANDER-  
 STEGEN.

(which is a common form of settlement), there are both an express power of appointment and a trust for a separate use, affecting the same life estate; and yet they are quite distinct. This is strongly illustrated by the cases of *Barrymore v. Ellis* (a), and *Brown v. Bamford* (b), and on appeal (c). In the former case, on the marriage of Lady *Barrymore*, a widow, with Mr. *Williams*, an annuity of 300*l.*, to which the lady was entitled for her life, was assigned to trustees, upon trust, during the joint lives of the husband and wife, to pay the annuity to such persons and for such purposes as she should by writing under her hand appoint, but so as not to deprive herself of the benefit thereof by sale or other anticipation; with a declaration that the receipts of Lady *Barrymore*, or of any person to be by her appointed to receive the same, should be sufficient discharges to the trustees; and in default of appointment to pay the same to her for her own sole and separate use. The Vice-Chancellor held that the clause against anticipation attached to the power, and not to the trust for her separate use; and that, although she could not make a valid appointment by way of anticipation by an execution of the power, she could make a valid assignment by way of anticipation by virtue of the right of disposition inherent in the trust for her separate use; thus clearly recognizing the distinction between the power and the trust for separate use.


In the latter case, leaseholds and stock were bequeathed to trustees, in trust, during the life of a married woman, to pay the rents and dividends to such persons, and for such purposes, as she by writing under her hand, when and as the same should become due, but not by way of

(a) 8 Sim. 1.

(c) 1 Phil. 620.

(b) 11 Sim. 127.

assignment, charge or anticipation, should appoint; and in default of appointment *into her proper hands*, for her sole and separate use; for which purpose the testator directed that her receipts in writing should be good and sufficient discharges to the trustees for the said rents and dividends. Here the language of the trust for the separate use was different to that in *Barrymore v. Ellis*; but the Vice-Chancellor held that it came within the principle of that case, and decided accordingly.

1853.  
  
 VAUGHAN  
 v.  
 VANDER-  
 STEGEN.

On appeal, the Lord Chancellor at first expressed an opinion in favour of the Vice-Chancellor's judgment; but he afterwards directed the case to be reargued, and then came to a different conclusion; but so far from doubting the principle of *Barrymore v. Ellis*, he clearly recognized it, but thought that it did not apply to the case before him. He says in his judgment, "His Honor considered that the case came within the principle of *Barrymore v. Ellis*, viz.:—that where a limited power of appointment is created, and in default of the execution of such power the estate is given generally to the same person, it is competent to the donee to dispose of the estate without regard to the power; the execution of which he is at liberty to waive or abandon. The question is not however as to the principle so stated, but as to the application of it to the present case. I think it has no such application;" and he held that the restriction against anticipation extended to the whole gift.

These cases clearly recognize that a power of appointment given to a married woman, and a trust for her separate use, are perfectly distinct, even when they affect the same estate or interest; *à fortiori*, they are perfectly distinct when the trust for separate use affects only the life estate, and the power affects only the reversion.



1853.  
VAUGHAN  
v.  
VANDER-  
STEGEN.

And as a power of appointment given to a married woman is altogether different in its nature from a trust for her separate use, so her execution of the power has not the effect of creating a trust for her separate use. No doubt if she has a power of appointing by deed, she may, if she pleases, in executing that power, expressly appoint the property to trustees in trust for her own separate use; but unless she does so, the exercise of the power cannot have any such effect. If she appoints the property in favour of certain objects, and for their benefit, by what conceivable process are they converted into trustees for her separate use? *A fortiori*, if the power only authorizes an appointment *by will* of the reversionary interest expectant upon her own death, it seems quite incomprehensible how the execution of that power by her will should have the effect of bringing about a settlement of the property after her death in trust for her separate use. And if not, how can it be applied in payment of her debts, or engagements in the nature of debts, to the payment of which nothing is applicable but such estate or interest as is expressly settled in trust for her separate use.

The propriety of the conclusion that the creditors of a married woman have no right to resort for payment to property appointed by her will under an express power, seems to me to derive no slight illustration from this consideration. In the case of a *man* executing a general power of appointment by will, even though it be only a power over the equitable interest, a Court of Equity will not have recourse to the appointed property for payment of his debts, until all his own property, real as well as personal, legal as well as equitable, and whether specifically devised and bequeathed or not, has been first exhausted

by the creditors. The appointed property, in respect of its liability to his debts, stands as it were behind the shelter and protection of that property of which he is the owner. But if it be held that in case of a married woman executing a general power of appointment by will, her creditors have a right to resort to the appointed property, it is impossible to do this justice to her appointee; for whatever property, real or personal, belongs to her, not being settled to her separate use, is entirely exempt from all liability to her debts. Even though it be trust property, a Court of Equity cannot touch it to pay her creditors. So that her heir as to any freehold property held generally in trust for her, and her husband as to her leaseholds and other personalty, would, on her death, hold those several estates free from her debts, while the appointee under her will made in execution of an express power would have his appointed estate taken from him to pay those debts. It appears to me contrary to all reason and justice that the creditors of a married woman, whose capacity to contract general debts is hardly yet fully recognized even by Courts of Equity to the extent of property settled in trust for her separate use, and is utterly ignored by Courts of Law, should have a better right to resort to property appointed by her will under an express power, than they would have if their debtor was a man, who is of course competent to contract debts without any limit or restriction.

No case can be found in which the Court has applied the property appointed by the will of a married woman in exercise of a power to the payment of her debts. But a case of *Hughes v. Wells* (a) was cited on behalf of the

1853.  
  
 VAUGHAN  
 v.  
 VANDER-  
 STEGEN.

(a) 9 Hare, 749.

1853.  
  
 VAUGHAN  
 v.  
 VANDER-  
 STEGEN.


creditors, in which it is suggested that Lord Justice *Turner*, when Vice-Chancellor, intimated an opinion that the Court might do this. If I found a deliberate opinion to that effect expressed by that learned judge, it would make me very much mistrust the soundness of my own conclusions. But upon examination of that case, it appears to me that the passage in the Vice-Chancellor's judgment, in which the language occurs which is supposed to express such an opinion, is addressed entirely to the question, how far the property of a married woman may be affected by her acts and conduct in participating in breaches of trust relating to that property; and even upon that question he abstains from expressing any decided opinion; and while discussing it, he merely glances, incidentally and in passing, at the idea that possibly property appointed by her will might be liable to her engagements. But the question did not arise for his consideration. I think it would be doing an injustice to the learned judge to regard that case as an authority in favour of the claim of the creditors.

Applying, then, the foregoing conclusions to the case now before me,—by the settlement of 1831, Mrs. *Vaughan* had a life interest in the leaseholds and personalty to her separate use, though without power of anticipation, and she had a general power of appointment by will over the reversion expectant upon her own death. The trust for her separate use affected only the estate and interest during her life. In respect of that life interest she was constituted a feme sole in the view of a Court of Equity; and assuming that she had the capacity to contract debts, as incident to her character of a feme sole, as her character of a feme sole was strictly confined to the life interest settled in trust for her separate use, so also was her capacity to contract debts; that is, her creditors could

not resort for payment to anything but the life interest. I do not stop to inquire how far the proviso against anticipation would oppose an impediment to their obtaining relief, because that question is quite immaterial to the point under consideration. The *reversion* which has now fallen into possession by the death of Mrs. *Vaughan*, and is the subject of the present contest, was not settled in trust for her separate use. She had only a general power of appointing it by will; and this power of appointing the reversion was no more a trust of the reversion for her separate use, than if she had no life interest at all under the settlement. Nor did her execution of the power create any estate or interest for her separate use. And as her creditors have no right, even in equity, to resort to any estate or interest except such as is settled upon an express trust for her separate use, they cannot come upon the reversion which is not settled in trust for her separate use; and it is therefore impossible to apply to this case the same rule of equity which is applied to the case of a man or a feme sole, exercising a general power of appointment, and make the appointed property available for the payment of her debts.

It was suggested, in the course of the argument, that *Gates's* debt, having regard to the special circumstances under which it was contracted, ought to be held to stand in a better situation than the other debts, with respect to the claim to obtain payment out of the appointed property. I am of opinion that there is no ground for making any such distinction.

Another question was raised by one of the learned counsel, though not much insisted on, namely, whether Mrs. *Vaughan's* will might not be held to operate as an execution of the power of appointment contained in the

1853.  
  
 VAUGHAN  
 v.  
 VANDER-  
 STEGEN.

1853.  
 ~~~~~  
 VAUGHAN  
 v.  
 VANDER-  
 STEGEN.

settlement of 1842. Without entering upon the question whether a power of appointment can be executed by a will made before the existence of the power, I am of opinion that Mrs. *Vaughan's* will was altogether revoked by her marriage with Lord *Dunboyne*, except only so far as it was made in execution of the power of appointment created by the settlement of 1831, as to the leaseholds and other personal property comprised in that settlement; and therefore it cannot operate as an execution of any power contained in the settlement of 1842 (a).

1854:  
 11th & 20th  
 February.  
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*Chancery  
 Improvement  
 Act.  
 Practice.  
 Supplemental  
 Statement.*

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COMMERELL v. HALL.  
 SAME v. BLOOMFIELD.

The 53rd sect. of the 15 & 16 Vict. c. 86, has no application after decree; nor before decree, for bringing new parties before the Court; but only for bringing forward new facts between the same parties. If new parties are to be brought before the Court, there must be a supplemental bill.

IN this case the testator, *John William Commerell*, by his will, dated the 13th May, 1845, devised and bequeathed his residuary real and personal estates unto and between such of his grandchildren, the Defendants *William Augustus Commerell* and *Henrietta Sophia Bloomfield* (then *Henrietta Sophia Commerell*), and the Plaintiff *John Edmund Commerell*, as should live to attain the age of twenty-five years.

On the 22nd December, 1847, the testator died.

On the 26th May, 1848, the original bill was filed for the administration of his estate. The Defendant, *Hen-*

(a) Some time after the above judgment was delivered, on the cause being spoken to, the attention of the Court was drawn to the case of *Stead v. Clay*, 4 Russ. 550, and to another case (not reported). The Vice-Chancellor took time to consider the effect of these cases.

*rietta Sophia Commerell*, having married the Defendant, *F. G. Bloomfield*, and a child, the Defendant *Arabella Edith Commerell*, having been born of such marriage, and the Defendant *William Augustus Commerell* having married the Defendant *Maria Commerell*, a supplemental bill was filed for the purpose of bringing such child and the newly married wives and the trustees of their respective marriage settlements before the Court.

1854.  
COMMERELL  
v.  
HALL.  
SAME  
v.  
BLOOMFIELD.

On the 8th February, 1850, a decree was made in both the suits. A separate report had been since made under the decree as to debts and legacies, but the Master had not yet made his general report. Orders had also been made for division of portions of the fund according to the interests of the parties entitled.

The Defendants *Henrietta Sophia Bloomfield* and *William Augustus Commerell* respectively attained their age of twenty-five years some time since.

Since the decree, two other children had been born of the marriage of the Defendants *F. G. Bloomfield* and *Henrietta Sophia Bloomfield*.

The Plaintiff had married, and a settlement had been made, by which his share in the testator's residuary real and personal estate had been conveyed to trustees, upon trust, in case of the Plaintiff's attaining the age of twenty-one, to raise a sum of 15,000*l.*, and hold the same on the usual trusts for the husband and wife for their respective lives, and afterwards for the children of the marriage, with powers of maintenance and education, and subject to the raising such sum, in trust for the Plaintiff absolutely.

1854.

  
 COMMERELL

v.

HALL.

SAME

v.

BLOOMFIELD.

The Plaintiff had, since the execution of the settlement, attained his age of twenty-five years.

For the purpose of placing these facts before the Court, and obtaining a supplemental order or decree against the newly-born children of the Defendants Mr. and Mrs. *Bloomfield*, the wife of the Plaintiff and the trustees of the settlement, it was proposed (with a view to saving the expense and length of a supplemental bill) to file a statement under the 53rd section of the 15 & 16 Vict. c. 86, and the 44th Order of August 7th, 1852. It being understood that the record and writ clerks objected to file such statement without the sanction of the Court, on the ground that the above sections of the acts and orders, do not apply to cases where a decree has been made, the case was stated to the Court.

Mr. *Hetherington* appeared on the application.

On the 20th February the VICE-CHANCELLOR said he had conferred with the other judges of the Court, and they all concurred in the opinion that the 53rd section of the 15 & 16 Vict. cap. 86, did not apply *after* decree. Nor did it apply *before* decree, to bringing new parties before the Court, but only to the statement of new facts between the same parties. When it was desired to bring new parties before the Court, a supplemental bill must be filed.

1854:  
28th Jan. and  
21st Feb.

Principal and  
Agent.  
Solicitor and  
Client.

SMITH v. POCOCKE.

**T**HIS was a summons adjourned from chambers. The question turned on the claim of Miss *Morris* coming in as a creditor under a decree in a creditor's suit against the estate of one — *Dixon*, deceased, a solicitor.

The material facts, as they appeared by the affidavits and oral examination of Miss *Morris*, were as follows:— from about 1837 down to the time of his death, Mr. *Dixon* acted as the solicitor of Miss *Morris* and her adviser in her money affairs. She placed from time to time considerable amounts in his hands, for which he undertook to find securities.

The first claim was in respect of a sum of 300*l.* advanced by him to one *Russell*, on the security of some leasehold houses which were subject to an annuity of 80*l.* to the mother of *Russell*; and he was entitled to one-sixth of the surplus rents; and if he survived his mother to one-sixth of the property absolutely; but if he died during her life, leaving children, then such children took. At the time when the money was lent, a policy on *Russell's* life was effected; but *Dixon* did not tell his client that there was such a policy, nor that his interest was subject to a contingency. *Russell* failed. *Dixon* let the policy drop. From time to time he paid to Miss *Morris* interest on account. He told her that on the death of *Russell's* mother she would be paid. The average annual income of the mortgaged property was not more than 10*l.* a year during Mrs. *Russell's* life. The next investment com-

*A.* placed monies in the hands of her solicitor, who acted also for her as a money scrivener, undertaking to find securities for her. He placed the monies out on insufficient securities, misrepresenting to her their character: Held, that as against him, if living, it would have been, and as against his estate after his death it was not, a matter for an action for negligence, but a matter of account between principal and agent, and the client had a right to reject the charge for disbursements on the insufficient securities.



1854.  
  
 SMITH  
 v.  
 РОССОКЕ.

plained of was 250*l.* to one *Gilbert*, in August, 1838. It did not appear that at the time of taking the security the value was not sufficient. In 1839, *Dixon* purchased the equity of redemption; after that he paid the interest regularly. The next transaction complained of was the advance by *Dixon* to one *Horen* in 1839 of 500*l.* on some small leasehold property in mortgage for 475*l.* to *Dixon's* brother. The mortgage to *Dixon's* brother was paid off; and *Dixon* afterwards paid interest to Miss *Morris*, not telling her the real nature of the transaction. It appeared moreover that *Horen* had never taken possession of the property nor even paid any rent, and the ground landlord treated the lease to *Horen* as abandoned. 200*l.* was lent to *Horen* on security equally insufficient.

Mr. *J. V. Prior*, for Miss *Morris*.

All this is not mere negligence in an agent; it is a fraudulent misapplication of the client's money by her solicitor, who, by receiving her money and undertaking to invest it, made himself a trustee. [He cited *Blair v. Bromley* (a), *Craig v. Watson* (b).] These cases are authorities for the position that Miss *Morris* might have filed her bill against *Dixon* if he were now living. When a client puts his money in his solicitor's hands to find securities, he becomes in effect a trustee; he is much more than mere solicitor. [He referred also to *Arnot v. Biscoe* (c); *Evans v. Bicknell* (d); *Burrowes v. Lock* (e); *Colt v. Wollaston* (f).] At law we could not proceed by an action for damages; we should be barred by the

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|-------------------------------------------------------------|----------------------------------------|
| (a) 5 Hare, 542, and referred in particular to pp. 556—559. | (d) 6 Ves., in particular pp. 182—183. |
| (b) 8 Beav. 427.                                            | (e) 10 Ves. 470.                       |
| (c) 1 Ves. sen. 95.                                         | (f) 2 P. Will. 154.                    |

ns, and fraud could not then be set

1854.

SMITH

v.

POCOCKE.

./, for the Plaintiff in the suit, represent-  
other creditors.

iteen years have elapsed since the transaction in  
question took place, and the solicitor, whose estate it is  
attempted to charge, is dead.


The case made by Miss *Morris* is founded on her  
evidence only. There is no other evidence of the nature  
of the original transaction. Indeed there is no evidence  
of the monies of Miss *Morris* ever having come to the  
hands of *Dixon*.

[The case then stood over in order that Miss *Morris*  
might be cross-examined *vivâ voce*. It was resumed on  
the 21st February, when Miss *Morris* was examined, but  
her evidence on affidavit was not shaken.]

Mr. *C. Hall* continued:—The case made by the  
claimant is, that her solicitor undertook to find securities  
and to keep them up; in fact, that he was bound to  
guarantee them and to keep them up. That cannot be  
the law; that may be the rule as to trustees, but this sort  
of case cannot be put so high as that of trustees.

The learned counsel analysed the several transac-  
tions to show that there was at any rate no fraud proved,  
and that the securities taken were not absolutely impro-  
per, though not such as a cautious man would have taken.

This, if anything, is a case of negligence, and the re-  
medy if at all is at law. But it is clear that at law, as to

1854.  
  
 SMITH  
 v.  
 POCCOCKE.

negligence in an agent, the statute runs from the time of the negligence, not of the discovery. There is therefore here no legal claim. *Howell v. Young* (a), *Blair v. Bromley* and *Craig v. Watson* are very distinguishable. In those cases there was clear trust and great fraud. [He referred also to *Tylee v. Webb* (b).]

Mr. *Southgate* appeared for *Dixon's* administrator. He cited *Battley v. Faulkner* (c); *Short v. M<sup>c</sup>Carthy* (d); *Brown v. Howard* (e); *Whitehead v. Howard* (f), on the question of the statute running against an action for negligence.

Mr. *Prior* replied.

The VICE-CHANCELLOR :

As to two of these cases, the advance of 350*l.* to *Russell* and of 500*l.* and 200*l.* to *Horen*, I feel no doubt. The only part of the case in which I could entertain any is the advance to *Gilbert*.

Taking first the advance to *Russell*. The security is a reversionary interest in *Russell*, expectant on the death of his mother, and there is no doubt that Miss *Morris* was made aware that the property was reversionary ; but she was also informed that it was an ample and sufficient security ; that she might be kept out of her interest during the lifetime of *Russell's* mother ; but that she might safely invest her money upon it : that was the representation made to her. Now, with regard to the question what were the circumstances, as the matter depends on trans-

(a) 5 Barn. & Cress. 259.

(b) 14 Beav. 14.

(c) 3 Bar. & Ald. 288.

(d) 3 Bar. & Ald. 626.

(e) 2 Brod. & Bing. 73.

(f) Ibid. 373.

actions which have taken place personally between Miss *Morris* and *Dixon*, and as the evidence of these rests entirely on the allegations of Miss *Morris*, it appeared to me that it would be desirable, and due to the interests of the other creditors, to have the opportunity of examining Miss *Morris* orally, and, although that examination has not added much to the stock of facts, yet I am glad that it has taken place; because it has removed the sort of hesitation and difficulty that one feels in placing implicit confidence in the mere affidavits of the party; and the cross-examination of Miss *Morris* has satisfied me that she has not stated anything that she did not believe to be true.

1854.  
SMITH  
v.  
POCOCKE.

With respect then to the advance to *Russell*. I think there is ground for coming to this conclusion, that the representations made to Miss *Morris* were that the security was ample in amount and certainty for securing her advances, though she was informed that it was reversionary, and that she might have to wait for her interest; but it was not stated to her that its whole value depended on *Russell* dying leaving children, living his mother. That was not communicated to her, and without doubt on these facts *Dixon* was liable in some form to Miss *Morris*.

Take next *Horen's* case. The conclusion at which I have arrived as to the facts is this:—*Dixon* had, as Miss *Morris* represents, a great interest in *Horen*. *Dixon's* brother had lent to *Horen* 450*l.* He had therefore a particular interest in *Horen*. Then, under his recommendation, Miss *Morris* advanced two sums, of 500*l.* and 200*l.*, to *Horen*, on what was represented to her to be a good security, she being wholly ignorant what it really was. It turns out that as to the 200*l.* the security was

1854.  
 ~~~~~  
 SMITH  
 v.  
 РОССОКЕ.

a piece of land held under a lease for a term of forty-five years and a quarter, at a ground rent of 25*l.* a year, and subject to rates, taxes, &c. But on application for information being made to the ground landlord, it turns out that neither *Horen* the mortgagor, nor any person on his behalf, ever took possession of the property, or ever paid any rent for it. The landlord had never heard of any dealings by *Horen* with the property, and had considered and treated the lease as abandoned. I am of opinion, without any doubt or hesitation, that as to that sum *Dixon* is liable.

So as to the 500*l.*, that was advanced on the security of leasehold property, as to part of which only six and a half years of the term remained, and as to other parts of which the outgoings are so great that the security is absolutely worthless.

Next, as to the money advanced to *Gilbert*. There is no direct evidence to show that the security was not at the time of the advance of sufficient value. *Dixon* having monies of Miss *Morris* in his hands, which he had undertaken to advance for her on securities, lent it to *Gilbert*, and in his account charges it accordingly. *Primâ facie*, I should not have considered this case as standing on the same grounds as the others, there being nothing to show that the security was not originally a proper security, nor to show that even now it would not realize a sufficient amount. But then this takes place about a year after. *Dixon* himself bought *Gilbert's* equity of redemption, and so became himself the mortgagor, and he continued to pay the interest. It appears to me that under these circumstances there was neither fraud nor negligence; but *Dixon* is responsible as mortgagor. In that character the 350*l.* is a good charge against him.

Now as to the *form* in which *Dixon* is to be held liable. It has been argued that the remedy is an action for damages for neglect; that he is an agent who has failed in his duty, and an action for damages may be brought; but that the claimant cannot come into equity; and that if an action were brought in a Court of Law, she would be barred by the statute. Now there is no question as to this point, that this being a proceeding in effect against the general creditors of *Dixon*, they can be in no different situation than *Dixon* himself would be. If then *Dixon* were living, could he say, "You are suing in equity. That is wrong; your course is an action at law, and at law I should defeat your claim by setting up the statute?" I put aside the fact that this is a general administration of *Dixon's* estate. I am bound to regard the case as if Miss *Morris* had filed a bill against *Dixon*. Now, beyond all doubt, the facts which would have been stated on such a bill are, that from 1837, or thereabouts, *Dixon* had the entire control of Miss *Morris's* money matters. He had acted for Miss *Morris* just as if he had been her banker; and more than that, he acted for her as her solicitor and money scrivener. He acted under a general agency to make investments for her. That was the position of *Dixon* as to Miss *Morris*, and she could have filed her bill against him to account to her for all the sums of money belonging to her, that he had had in his hands. In taking such an account, if *Dixon* had charged her with disbursements of her money, she might without doubt have resisted it on the ground that the mode of disbursement was not within the scope of the authority given by her. *Dixon* might have said in answer, "I have rendered you accounts; they have been acquiesced in from time to time, and that amounts to a stated account." But would not Miss *Morris* have had a right to surcharge and falsify? and if she had taken

1854.

SMITH

v.

РОССОКЕ.

1854.  
  
 SMITH  
 v.  
 POCOCKE.

that course she would have had a right to say, that as to any particular item of charge by way of disbursement, such disbursement was not within *Dixon's* authority. It comes therefore to this, that it is a question of account between Miss *Morris* and *Dixon*. *Primâ facie* his accounts would be binding; but (and I am regarding Miss *Morris's* claim as if she had made it during *Dixon's* life) if Miss *Morris* had filed her bill, then on proof of the facts of this she might have surcharged and falsified the account, case, by showing the misrepresentations as to the investments.

This is not, then, a mere legal demand for damages; it is a question of items in an account; a question how far, under the circumstances, *Dixon* can discharge himself by the disbursements made by him.

Without, then, meaning at all to dispute the authority of the decisions referred to, as to the effect of the statute in actions for damages, in this Court, when the question is one of account between principal and agent, between the owner of money and his money scrivener, the statute does not apply. Therefore, in both *Russell's* and *Horen's* case, Miss *Morris* has a right to have an account of the monies lent on the securities, struck out of the account. As to *Gilbert's* mortgage, *Dixon* will be liable as mortgagor.

The order was in substance that, as to *Russell's* and *Horen's* securities, they should, so far as they were unrealized, be realized, and the amount paid to Miss *Morris*; and that she should go in and prove for the deficiency.

1854 :  
20th February.

LORD v. COLVIN.

*Evidence.  
Practice.*

**MR. ANDERSON** and *Mr. Collins* moved, on behalf of the Plaintiff, for inspection of certain documents.

In this case a special examiner had been appointed to examine witnesses in Scotland. On the examination of one of the witnesses for the Defendant, documents had been put into his hands by counsel for the Defendant; they were of three classes:—1stly. Documents as to the contents of which the witness was examined; 2ndly. Documents which he was desired to look at to refresh his memory as to the matters on which he was examined; and 3rdly. Documents which were put into his hands merely to prove the handwriting. As to all these documents, the Plaintiff's counsel had insisted on his right to see them at the examination. The examiner had held, that as to the first class the Plaintiff's counsel had a right to see them; as to the two other classes he had not. The motion was for liberty to inspect these two classes of documents.

*Mr. Anderson* referred to the 23rd and following sections of the 15 & 16 Vict. c. 86. The old practice as to examination of witnesses is abolished; the practice is assimilated to that which prevails at common law. One of the documents put into the hands of the witness to refresh his memory is an opinion of *Mr. Pemberton*,

On the examination of witnesses orally under the 15 & 16 Vict. c. 86. If a document is put into the hands of a witness by the party examining him, the other side may require to see the document.

1. If the witness is examined upon its contents generally.

2. If, although the document is originally shown to the witness merely to refresh his memory, questions are afterwards put relating to its contents.

He may not require to see the document.

1. If the document is put into the hands of the witness merely to re-

fresh his memory, and nothing more is done.

2. If he is examined merely to prove the handwriting.



1854.  
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 LORD  
 v.  
 COLVIN.

taken on behalf of the Defendant, and various questions are put to the witness on facts as to which he uses that very opinion. Is it not common sense that the party against whom that opinion is taken should see it? How can he cross-examine the witness in the matter unless he sees the document? [He referred to *Taylor on Evidence* (a); *Sinclair v. Stevenson* (b); *Rex v. Ramsden* (c); *Holland v. Reeves* (d).] On these authorities it is clear that as to all documents put into the hands of a witness, except those so put in merely to prove handwriting, the other side has a right to see them. As to the documents put into the witness' hands merely to prove handwriting, I admit that at nisi prius the other side cannot insist upon looking at them; but that is because it does not follow that they will be used; but if used by the party proving them, it is equally clear that the other side has then a right to see them and cross-examine upon them. But this is a different process; here the witnesses are no further examined than before the examiner; and if the documents are not looked at then, there can be no opportunity at the trial of cross-examining upon them, because the witness will no longer be there.

Mr. Glasse and Mr. Welford for the Defendant.

There can be no doubt on this question. As to the mere exhibits, where proof of handwriting only is wanted, they used to be proved either by affidavit or *vivá voce* at the hearing; and who ever heard that such documents could be produced before they were used at the hearing? The reason of the practice was, that on the proof of handwriting merely, there could be no cross-examination, and therefore inspection would be quite idle. The practice is the same at common law; *Sinclair v. Stevenson*

(a) Vol. 2, 938, and the cases there collected.

(b) 1 Car. & Pay. 583.

(c) 2 Car. & P. 604.

(d) 7 Car. & P. 36.

recognizes it. [They referred also to *Cope v. Thames Haven Dock Company*(a), and *Collier v. Nokes*(b).] That is the rule at law. As to the opinion of Mr. *Pemberton*, that is the same as the case of a simple exhibit. If any question is put relating to the contents of the document, the counsel on the other side may object to the question unless the document is produced; but if the question is put and answered, the mere putting the document afterwards into the witness' hands, cannot entitle the other side to see it. Here no question was put on the contents of the document after it was put into the witness' hands.

1854.  
  
 LORD  
 v.  
 COLVIN.

Mr. *Morris*, for other Defendants in the same interest.

The VICE-CHANCELLOR intimated that the Plaintiff's counsel need only reply on the question as to third class documents.

Mr. *Anderson*, on this point.

It may be quite true that at nisi prius production of such documents cannot be called for until the party proving them uses them as evidence. But the practice to be followed is not that at a nisi prius trial, but that pursued under a commission at common law, when the witness is going abroad, &c. We can find nothing in the books on that practice, but it is clear that it must be in principle different from that at nisi prius, because if the witness goes abroad and does not return for the trial, then, if the document is used by the party proving it, the other side can have no opportunity of cross-examining.

The VICE-CHANCELLOR:

If I were to follow my own opinion as to what would be just and right, I should say every document whatever

(a) 2 Carr. & Kir. 757. (b) 2 Carr. & Kir. 1012.


1854.  
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LORD  
v.  
COLVIN.

ought to be produced, whether put into the witness' hands to prove handwriting only, or to prove anything else; every document produced should, I think, be shown to both sides. However, I have no right to indulge any such notions; I am bound to adhere to what the legislature has prescribed as the course to be adopted, and that depends on the 31st section of the act, the 15 & 16 Vict. c. 86. [His Honor referred to that section, and proceeded.] Under that section I have no option; I am to follow the course followed by a Court of law when the witness is going abroad, or as near thereto as may be. Now as to what that practice is, whether it is the same as at nisi prius, or whether it is different, no authority has been produced; and I must assume that there is no authority on the point. I must, in the absence of evidence of the precise practice, go as near thereto as possible. Now there is a certain and settled rule of practice with regard to the examination of witnesses at the hearing, that is, at the trial of an action, and in substance it is this:—If a paper is put into the hands of a witness, and he is asked in whose handwriting it is, and no more, then it is not competent to the other side to require production of the document. So if a paper is put into the hands of a witness to refresh his memory; if after that nothing comes of it, if nothing more be done, then the other party has no right to look at it. But if anything further is done; if the witness is asked and answers questions about the document, or the facts referred to in it, then at law, the party on the other side has a right to see the document. The conclusion to which I come is, that that is the settled rule at law at the trial. It has not been shown to me that when a witness is under examination under a commission, the witness being about to go abroad, &c., there is any different rule, and I am not disposed to depart from what I find to be the rule at nisi prius, and

to adopt any different rule. As to the documents, therefore, which have been put into the witness' hands merely for proof of handwriting, or merely to refresh his memory, and nothing more, I think the other side cannot insist upon production. As to the others, they must be produced (a).

(a) This decision was affirmed by the Lords Justices on the 24th February, 1854, on somewhat different grounds. 13th, 18th and 20th February.

1854.  
  
 LORD  
 v.  
 COLVIN.

1854 :  
  
*Specific  
 Performance.  
 Contract.  
 Statute of  
 Frauds.*

COX v. MIDDLETON.

**THIS** was a suit for specific performance. The general case made by the Plaintiff was this:—that being possessed of a certain leasehold house and appurtenances for a term of years, he entered into a verbal agreement with the Defendant for the purchase of it; and a lease was actually prepared, approved by the Defendant and executed by the Plaintiff, and tendered for execution to the Defendant. That the Defendant refused to complete that agreement, and afterwards a fresh agreement in writing was entered into and signed by the Defendant. The Defendant afterwards refused to complete that agreement, on the ground that misrepresentations were made to him as to the state of the premises, and he now resisted it at the bar, on the ground that the agreement was not sufficient within the Statute of Frauds, and on the ground of the misrepresentations. The following are the material statements in the pleadings and evidence:—

The bill stated, that on the 21st day of October, 1852, the Plaintiff and the Defendant, having previously ver-

An agreement was in the following words: "A. agrees to pay 625*l.* for the cottage and stable, B. paying the expenses of the lease held by Mr. C. Signed A.:" Held, that such an agreement was not sufficient within the Statute of Frauds. A party contending for specific performance must show that his conduct has been fair. If he has made material misrepresentations to the Defendant, it is no answer

to say that the Defendant might have found out that they were misrepresentations. Specific performance is not of course, because there is a contract, but a relief in the nature of indulgence peculiar to the jurisdiction of equity.

1854.  
Cox  
v.  
MIDDLETON.

bally agreed for a lease from the Plaintiff to the Defendant of a cottage, described as No. 22, *Wellington Square*, and the coachhouse and stable at the rear of No. 21 in the same square, for the residue of the Plaintiff's term and interest therein, which was then a period of seventy-seven years and a quarter from the 29th day of September last, in consideration of a sum of 600*l.* to be paid to the Plaintiff on the execution of the said lease by him, and of a ground rent of 5*l.* per annum to be paid to the Plaintiff, his executors, administrators and assigns, for the remainder of the Plaintiff's aforesaid term and interest therein of seventy-seven years and a quarter, from the 29th day of September last, the Plaintiff, by the direction or with the privity and approbation of the Defendant, on the same 21st day of October, 1852, instructed Mr. *Charles Holt*, the Plaintiff's solicitor, to prepare a lease of the said premises upon the terms aforesaid.

That on the 22nd day of October, 1852, the draft of a lease of the said premises, in accordance with the said terms, was sent to the said Defendant for his approval by the Plaintiff's aforesaid solicitor, who, on the 27th day of October, returned it to the Plaintiff as approved by him, but requested that a certain recital therein might be shortened, which was accordingly done by Mr. *Holt*; and on the 28th day of October last the Plaintiff returned the draft of the said lease to Mr. *Holt*, and requested it might be engrossed for execution, and stated that he had made an appointment for 11 o'clock on Tuesday then next, being the 2nd day of November, with the Defendant to complete the said lease.

That on Tuesday, the 2nd day of November last, being the day fixed for the completion of the said agreement, the Plaintiff accordingly attended at Mr. *Holt's* office,

and certain persons who had a mortgage on the Plaintiff's aforesaid interest in the aforesaid leasehold premises also attended and executed the said leasehold and counterpart; but the Defendant did not attend, in consequence whereof, on the 17th day of November last, Mr. *Holt*, by the direction of the Plaintiff, wrote and sent to the Defendant a letter, saying he should attend on a subsequent day to tender the lease, and threatening a bill in Chancery if the Defendant did not then execute it.

1854.  
Cox  
v.  
MIDDLETON.

It then stated some further immaterial negotiations, and then that on the 4th day of December, 1852, the Plaintiff and Defendant met together, and in the presence of one *John Newman*, they finally agreed that the Defendant should give to the Plaintiff the sum of 625*l.* for the lease of the said cottage and premises for the term of seventy-seven years from the 25th day of December then instant, at a peppercorn rent, instead of at a ground rent of 5*l.*, per year, for the period aforesaid, being 25*l.* for the 5*l.* ground rent originally verbally agreed to be paid by the Defendant, and that the Plaintiff should pay the expenses of such lease; and in pursuance of such agreement as last aforesaid, and on the same 4th day of December, 1852, the Defendant, in the presence of the said *John Newman* and of the Plaintiff, signed a memorandum or contract for the lease of the said cottage and stable, the body of which was written by the Plaintiff in pencil, and of which agreement the following is a copy:—

“Mr. *Middleton* agrees to pay 625*l.* for the cottage and stable Mr. *Cox* paying the expenses of the lease held by Mr. *Smith*. *H. Middleton*. December 4th, 1852. Witness, *John Newman*.”

1854.

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Cox

v.

MIDDLETON.

On the 24th December, 1852, the following letter was sent by Mr. *Middleton's* solicitor to Mr. *Holt*:—

"7, *Whitehead's* Grove, December 24th, 1852.

"Sir, (Middleton and Cox.)

"I regret to state that an obstacle has occurred to the further carrying out of this arrangement for the present. The premises were represented by Mr. Cox as substantially and well built, and on that representation Mr. *Middleton* treated for the purchase of them. His attention having however been called to their construction, he has had them surveyed by Mr. *George Handford*, of this neighbourhood, and much to his disapprobation learns that they are seriously defective. Mr. *Middleton* however is desirous of doing what is right in the measure, and if Mr. Cox will remedy the defects pointed out in Mr. *Handford's* report (a copy of which I beg to enclose) to Mr. *Handford's* satisfaction, he will still carry out the purchase. Requesting you to consider this letter without prejudice.

"I am, Sir, Yours, very obediently,

"To *Charles Holt*, Esq. "H. *Whitehead*."

"93, *Guildford* Street, *Russell* Square."

To this the following reply was immediately returned:—

"93, *Guildford* Street, 24th December, 1852.

"Sir, Cox and Middleton.

"Your client, for the purpose of making a better bargain for himself, shuffled off a verbal agreement and made a written one with Mr. Cox, and he, through you, now attempts to impose upon Mr. Cox by saying that the premises were represented as otherwise than they are. Mr. *Middleton* was quite aware of the condition of the buildings long before he made his written

agreement with Mr. *Cox*. Unless I hear from you (before the opening of the Chancery offices) and receive the draft lease back approved, I shall file a bill without further notice.

1854.  
Cox  
v.  
MIDDLETON.

"Your's, most obediently,

"To *H. Whitehead*, Esq.,

"*Charles Holt*."

"7, *Whitehead's* Grove, *Chelsea*."

The bill stated that the contents of Mr. *Holt's* letter of the 24th December, 1842, were in all respects correct and true, and the Plaintiff never stated or represented to the Defendant that the *premises* were substantially and well built, or made any statement or misrepresentation to the Defendant to the like effect; but the Defendant himself examined and carefully looked into the state and condition of the premises before he entered into the contract of the 4th day of December, 1852; and he in fact perfectly well knew, or in fact ought to have known, and might have well known, the state and condition thereof when he made and entered into his aforesaid agreement of the 14th day of December, 1852, and long before, and he never asked or required the Plaintiff to make any statement or representation in relation thereto.

With reference to the misrepresentations, the Defendant, by his answer, swore that, between the 19th of November and the 4th December, 1852, he had several interviews with the Plaintiff, at which the Plaintiff frequently pressed him to purchase from him the said cottage, coach-house, stable and premises, and represented and stated to him that the same were substantially and well built, and that he had built the said cottage for his own residence, and that it would bear the inspection of any surveyor whom he, the Defendant, might send to look over it, or he made representations or expressions to that or the like purport or effect.



1854.  
  
 Cox  
 v.  
 MIDDLETON.

The Defendant's wife and daughter made an affidavit, by which they stated, that after the abandonment of the said negotiation, on or about the 17th day of November, 1852, and the 4th December then next following, the Plaintiff called several times on the Defendant at his then residence, and in the presence and hearing of the witnesses pressed the said Defendant to purchase from him the said cottage, coach-house, stable and premises, representing and stating to him that the same were substantially and well built; that he had built the said cottage for his own residence, and Defendant therefore could not suppose that he would have built it badly; and that it would bear the inspection of any surveyor whom the Defendant might send to look over it, or he made representations or expressions to that or the like purport or effect. The Plaintiff also made an affidavit, verifying many of the allegations in his bill, but he did not verify the allegation that he had not represented the buildings as in good repair. The remaining material facts appear in the arguments and the judgment.

Mr. *Elmsley* and Mr. *Southgate* for the Plaintiff.

The original contract, we admit, was not capable of being enforced, but then afterwards there is a fresh agreement, which is not disputed. The defence is, that the agreement is uncertain. But we say that, by referring to the lease, which we have a right to do, this property is sufficiently described: *Cowley v. Watts*(a), *Ogilvy v. Foljambe*(b).

The Court ought here to import into the contract the terms of the lease previously agreed upon.

Mr. *Chandless* and Mr. *Haldane* for the Defendant.

As to the agreement itself it is ambiguous on the face

(a) 17 Jur. 172.

(b) 3 Mer. 53.

of it, and evidence cannot be let in to construe it. If it is read thus: "Mr. *Cox* to pay the expense of the lease," which assumes that a lease is to be granted, then what is to be the lease? for what term is it to be? what are to be the covenants? All the cases are on this point consistent, that the Statute of Frauds requires that the terms of the agreement must appear on the face of the written instrument itself, or on some instrument to which it refers. In *Ogilvie v. Foljambe* the identity of the house appeared by the written instruments. So in *Cowley v. Watts* (a) and *Owen v. Thomas* (b). They cited also *Clinan v. Cook* (c), as to the distinction between what is necessary to support a bill for specific performance, and what is sufficient to resist specific performance.

1854.  
Cox  
v.  
MIDDLETON.

The Plaintiff will not lose his right to an action, if he has any, and that is his proper and only remedy: *Lacklan v. Reynolds* (d), *Cadman v. Horner* (e).

On the ground of misrepresentation, the Plaintiff says there were no misrepresentations; the Defendant swears positively that there were; and his wife and daughter, who are competent witnesses, support the statement. The Plaintiff has made an affidavit. Why did he not swear that he did not make any such misrepresentations? He declines to do so; and it must be assumed, therefore, that the Defendant is right.

Mr. *Elmsley* in reply.

20th February.

On the question of misrepresentation, the Plaintiff, it is alleged, represented to the Defendant that the pre-

(a) 17 Jur. 172.

(d) 1 Kay, 52.

(b) 3 Myl. & K. 353.

(e) 18 Ves. 10.

(c) 1 Sch. & Lef. 40.

1854.  
  
 Cox  
 v.  
 MIDDLETON.

mises were sound. The Plaintiff denies that in his bill. It is for the Defendant to prove it. However, the misrepresentations, if they existed, are perfectly trivial. The real question is, contract or no contract; and we say that the contract is sufficiently clear.

The VICE-CHANCELLOR:

Specific performance is resisted, in this case, on two grounds.

1st. That, according to the provisions of the Statute of Frauds, there is no sufficient contract.

2ndly. That if there is, the Defendant executed it on the faith of representations made by the Plaintiff, which prove to be false.

As to the first ground, no doubt the Statute of Frauds, requiring a contract to be in writing, requires that the contract shall be sufficiently certain as to what the parties are contracting for. And if we take this contract alone, striking out all extrinsic evidence, it stands thus. [His Honor stated the agreement.] Now this is a sufficient contract in this respect: it is signed by the party to be charged, and the signature is proved. But if we were to take this contract by itself, and put a construction upon it, how ought it to be construed? Now I ought, it is said, to read it as if the words "Mr. Cox paying the expenses of the lease" were left out. If the contract stood so, there could be no difficulty or doubt about it, because, if parties contract together for the purchase of a house, *prima facie* the contract is to purchase the fee simple. It may be that the party purchasing may know that the vendor had not the fee simple, and then such a

contract might be performed by the purchaser having all the interest of the vendor. Or if the purchaser did not know what was the interest of the vendor, and the contract imports a contract for the purchase of the fee simple, the purchaser might say, I will exercise the option of taking such estate as you have. That would be the construction of the contract, if the words referred to are omitted. But those words make all the difference. I will first, however, take them in the sense in which the Plaintiff says they ought to be taken, viz., that the word "lease" does not refer to any lease held by *Smith*, but it means the instrument of grant or conveyance by which the vendor was to convey his interest to the purchaser. Now I adopt the Plaintiff's view of the construction to be put on the word lease. *Cox*, then, is to pay the expense of the lease, of a lease that is to be granted. Now, if I exclude all evidence, if I look at the contract *per se*, irrespective of all extrinsic circumstances, there is nothing said of the interest of the vendor; and what he is dealing with professes, therefore, to be the fee simple, and you have then words which show that a lease is to be granted by *Cox* to the Defendant; and then the question is, what lease? for what term? It is said that the language means a lease for the whole term. But then, with what reservation, what covenants? But if the Plaintiff held in fee simple, which is what appears on the face of the contract, is the lease to be one in perpetuity, or what is it to be?

If *Cox* had only a leasehold interest, does it mean that? On the face of the contract there is no indication of the nature of the interest that *Cox* had, nor of what term was to be granted. But then it is said that the words of the contract do not mean a lease, but mean an assignment of the interest of *Cox*, whatever it is; and cases have been

1854.  
  
*Cox*  
*v.*  
 MIDDLETON.

1854.  
  
 Cox  
 v.  
 MIDDLETON.

cited to show that when a party having a leasehold interest enters into a contract for sale, and there is an agreement to give so much for the lease, that means the particular lease. But that is quite different from an agreement that *a lease* is to be granted. I do not see what there is in this contract to call upon me to put that forced construction on the word lease, that it does not mean a lease, a term to be granted by the vendor, but a conveyance or assignment. Looking then at the matter without introducing any extrinsic circumstances, I think this contract is insufficient. But if we look at the Plaintiff's own representations, still less will it appear that there is a sufficient contract. [His Honor referred to the 7th paragraph of the bill stated in p. 211.]

Now the statement of the contract is *the lease*; that may mean, in general terms, a lease, or it may mean *the lease* which the Plaintiff held. The lease which the Plaintiff held is stated to be for seventy-seven years from Christmas, 1852, and that would agree with the statement in the 7th paragraph of the bill. But then the Plaintiff states a *verbal agreement* by the Defendant to take a lease on certain terms, for the remainder of the Plaintiff's term; and that a lease was prepared. The Plaintiff states that the lease was approved; and the lease is produced; and it turns out to be that the lease is not for seventy-seven years from Christmas, 1852, but for seventy-six and a quarter years from Christmas, 1852. So that the Plaintiff's own representation is, that the term which he says he had was seventy-seven years from Christmas, 1852; and he says he agreed to grant a lease to the Defendant for that term; and then he produces the lease, which he says was agreed upon, and that is for a different term. Is not that an answer to the Plaintiff's argument, that the agreement was for the purchase of the

lease which the Plaintiff had, and that the terms of the contract import a purchase of the lease held by the vendor, and not the grant of a lease?

1854.  
  
 Cox  
 v.  
 MIDDLETON.

In the cases which have been cited, the contract was clear; the agreement was for *the lease*, or an agreement to purchase *the interest* of the vendor. If the purchaser has contracted for the fee simple, and he offers to take less, he may of course take all the vendor can give; but if the contract is either for *a lease* in express terms, or a contract in such terms that it imports that a lease is to be granted, as this contract does, I am of opinion that such a contract does not satisfy the statute, and the Plaintiff has no right.

[On the second point, whether there were any representations made to the Defendant as to the state of the building, and, if there were, whether they were false; his Honor referred to the letter of the Defendant of 24th December, 1852, and the letter of the Plaintiff in reply of the same date, and then proceeded.]

The Plaintiff in his letter does not go on to say that the premises were in repair, but that the Defendant knew their condition. Now what does the Plaintiff say in his bill. [His Honor read the paragraph stated in p. 213.] Now this statement is positively denied by the answer. The Defendant swears that it was so represented to him. The Plaintiff has chosen to examine himself as a witness, to substantiate the allegations of the bill; but when he comes to the part of the bill where it is alleged that he never made the representations, he (very properly, no doubt) does not say a word in his affidavit in support of those allegations of the bill. If it stood there alone, I should have sufficient ground to

1854.



Cox

v.

MIDDLETON.

say that the Plaintiff having made those allegations, the Defendant having denied them on his oath, and the Plaintiff, volunteering to make an affidavit, declining to make it on this point, the Defendant's representation must be taken to be correct. But besides that, the Defendant's wife and daughter are both examined as witnesses, and they state the representations that were made to the Defendant in their presence. [His Honor referred to the evidence stated in p. 214.] The only attempt of the Plaintiff to support his own allegations is an affidavit of *Newman*, who proves what took place at a meeting on the 4th December, and says that at that meeting no representations were made by the Plaintiff. This shows that the Plaintiff was perfectly aware of the importance of his allegations, and of supporting them. It is clearly, in my opinion, established that the Plaintiff did represent, on many occasions before the contract, that the premises were substantial and well built, and were, in fact, built for the Plaintiff's own use. But then it is said, that if the Defendant had taken the pains to look, he might himself have seen what was the state of the premises. But this is a suit for specific performance; and in such a suit it is not an answer to the fact of the Plaintiff having made false representations, to say the Defendant was imprudent. If the case stood on this ground only, I should refuse specific performance. If a Plaintiff comes here and asks relief; asks this Court to assist him in what is not the assertion of a strict legal right, but to assist him on grounds standing on the peculiar jurisdiction of this Court, he must show that his conduct has been clear, honourable and fair. If he has been guilty of misrepresentation, this Court will leave him to his remedy, if any, at law. On both grounds, the bill must be dismissed with costs.

1854:  
7th March.

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*Precatory  
Words.  
Trusts.*


PALMER v. SIMMONDS.

**T**HE will of *Henrietta Rosco* contained the following gifts:—

“ I give to my nephew, the Rev. *Thomas Harrison*, and my grand-nephew, *William Fountain Simmonds*, their executors, administrators and assigns, the sum of 2,500*l.*, upon trust, to invest the same in their names in the public stocks or funds of *Great Britain*, and to pay and apply the dividends and annual produce thereof in or towards the maintenance and education or otherwise for the benefit of *Henrietta Rosco Markham*, the daughter of *Robert Markham*, of *Laceby*, in the county of *Lincoln*, until she shall attain the age of twenty-one years; and in the event of her attaining the age of twenty-one, then in trust, to assign and transfer the *principal* of the said trust fund to the said *Henrietta Rosco Markham*; but if she shall not attain twenty-one, then in trust, to divide the principal of the said trust fund equally between them the said *Thomas Harrison* and *William Fountain Simmonds*, for their own use and benefit. I give to the said *Thomas Harrison* and *William Fountain Simmonds*, their executors, administrators and assigns, the sum of 800*l.*, upon trust, to invest the same in their names in the public stocks or funds of *Great Britain*, and to pay the dividends and annual produce thereof to my grand-nephew *Thomas Elrington Simmonds*, of *Laceby*, in the county of *Lincoln*, for his life, and after his decease then as to the *capital* of the said trust fund, in trust, to assign and transfer the same unto and equally between the children or child, if only one, of the said *Thomas Elrington Sim-*

Testatrix gave her residuary estate to *A.*, his heirs, executors, administrators and assigns for ever, for his own use and benefit, as she had full confidence in him that if he should die without lawful issue he would, after providing for his widow during her life, leave the bulk of her said residuary estate to *B.*, *C.*, *D.* and *E.* equally: Held, that this language did not describe the subject of gift with sufficient certainty to create a precatory trust.



1854.  
  
 PALMER  
 v.  
 SIMMONDS.

*monds* living at the time of his decease; but in case the said *Thomas Elrington Simmonds* shall leave no child living at his decease, then in trust, to divide the *capital* of the said trust fund equally between them the said *Thomas Harrison* and *William Fountain Simmonds*, for their own use and benefit. As to all the residue and remainder of my personal estate and effects which may remain after payment of my debts, funeral and testamentary expenses and legacies, and all my real estate (if any), I give and devise the same unto the said *Thomas Harrison*, his heirs, executors, administrators and assigns for ever, for his own use and benefit, as I have full confidence in him, that if he should die without lawful issue he will, after providing for his widow during her life, leave the bulk of my said residuary estate unto the said *William Fountain Simmonds*, *James Simmonds*, *Thomas Elrington Simmonds* and *Henrietta Rosco Markham* equally."

This was a special case, and the question was, whether by the above clause a precatory trust was created in favour of *W. F. Simmonds*, *James Simmonds*, *S. E. Simmonds* and *H. R. Markham*. *Harrison* was dead, without issue, having made a will. *W. F. Simmonds* was dead: the other three were living.

Mr. *Campbell* and Mr. *Law*, for the representatives of the testatrix *Henrietta Rosco*, stated the will and submitted the question.

Mr. *Teed* and Mr. *Pownall* for *James Simmonds*, *S. E. Simmonds* and *H. R. Markham*.

There is a trust (*Thomas Harrison* having died without leaving issue). The word confidence is equivalent

to trust, and is an imperative word: *Wood v. Cox* (a); *Horwood v. West* (b). The only difficulty is on the words, "the bulk of my residuary estate:" but the intention was to provide for the widow for life, and that points at a disposition of the *income*; and then the word *bulk* means, by juxta position with the other antecedent disposition, the *corpus* of the property.

1854.  
PALMER  
v.  
SIMMONDS.

Mr. *Rendall* for the representatives of *W. F. Simmonds*.

The question does not turn entirely on the specific meaning of the word *bulk*. The construction is this: *Harrison* had a discretion or power to provide for his wife; he might have given a part of the property to purchase an annuity for her: and then the remainder, or the bulk, would go over. If the testatrix did not create a trust in favour of the persons named, then she gave to *Harrison* absolutely. Now that cannot have been her intention; for *Harrison's* widow at any rate is to have a provision. Further, the word *bulk*, whatever may be its popular meaning, has here a construction put on it by the other gift; and the testatrix speaks of the residue as *her* estate, and the trust is for the nominees *equally*. Both of these circumstances are inconsistent with an intention to benefit *Harrison* exclusively. He cited *Malim v. Keightley* (c) and *Ware v. Mallard* (d). That is exactly this case. *Webb v. Wools* (e), which will be cited on the other side, is distinguishable. There, there was an express power to dispose of part of the property. So is *Green v. Marsden* (f). There, 1stly, the gift was to the *sole* use of the wife; 2ndly, the objects were not certain; 3rdly, the

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| (a) 1 K. 317, and 2 Myl. & Cr. 684. | (d) 16 Just. 492.     |
| (b) 1 Sim. & Stu. 387.              | (e) 2 Sim. N. S. 267. |
| (c) 2 Ves. jun. p. 333.             | (f) 1 Drew. 646.      |

1854.  
  
 PALMER  
 v.  
 SIMMONDS.

direction to give what should be remaining, rendered the subject of gift uncertain. These points distinguish it from this case.

Mr. *Baily* and Mr. *Ellis* for the parties claiming under *Harrison*.

1stly. There is no trust: to constitute a trust, there must be sufficient words; and the *subject* of gift must be certain. Here neither of those circumstances exists. The testatrix is not creating a trust by the use of the word "confidence," she is merely assigning her *reason* for giving to *Harrison* absolutely. In *Webb v. Wools* there were the same words as here, and it was held no trust. 2ndly. There is here uncertainty as to the quantity given. The word *bulk* does not mean the entirety, but the greater part; and then there is of course uncertainty. If *Harrison* could, and it is clear he could, diminish the property at all, he might diminish it *ad libitum*; and how is what is to go over to be ascertained? And if it cannot be, how can there be a trust? They referred to *Knight v. Knight* (a); *Cowman v. Harrison* (b).

Mr. *Teed* in reply.

[The VICE-CHANCELLOR confined the reply to the question whether the word *bulk* did or did not create uncertainty in the subject of gift.]

The word *bulk* does sometimes mean the whole. Here it may mean the *corpus*, after providing, out of the income, for the widow. It is really no more, after all, than a trust of the whole for the persons named, subject to a

(a) 3 Beav. 148.

(b) 10 Hare, 234.

power in *Harrison* to make a provision for his widow. He cited *Constable v. Bull* (a).

1854.

PALMER

v.

SIMMONDS.

The VICE-CHANCELLOR :

In most of the cases of this class the Court is called upon to do what it is persuaded was never the intention of the testator; for when a testator expresses his *confidence* that the devisee will do so and so, what he really means, is to say, that he expresses the *confidence*, because he does not mean to create a *trust*. He gives absolutely, because he has confidence. But then this Court has said, that is a reason why the Court should create a trust.

In this case the testatrix has expressed herself in the following manner. [His Honor referred to the residuary gift, and expressed a clear opinion that so far as regarded the words "as I have full confidence," they were sufficient to create a trust. He then proceeded.] But the question is whether the subject is certain; the objects and purposes are clearly certain. Now, in describing the subject as to which the testatrix expresses her full confidence that *Harrison* will leave it, that subject is described as "the bulk of my said residuary estate." If she had said "my residuary estate," I must, according to the cases, have held that there was a trust. But the question is, whether the words, "the bulk of my residuary estate," mean the same thing as "my residuary estate," or anything precise and definite. The testatrix has here used a term which is not a legal term; a term which has not in law any appropriate meaning. She has chosen to use a term which may have two different senses; it may have a strict sense, according to its derivation, or what I may term its classical sense: 2ndly, it may be used

(a) 3 Deg. & Sm. 411.

1854.  
  
 PALMER  
 v.  
 SIMMONDS.

according to its popular sense. But if its strict or classical sense and its popular sense are coincident, then no difficulty can arise as to the sense in which the testatrix uses it. Now it is to be observed that in this will, when the testatrix means to give a remainder, whether absolutely, or only on the happening of certain events, she has used proper legal terms. [His Honor referred to the 2,500*l.* gift, p. 221.]

Then there is another instance of the use of legal terms. [His Honor referred to the 800*l.* gift.] These show that when she wishes to describe persons to take in remainder, whether the gift over is absolute or only in certain events, she uses appropriate terms. Still more when she gives her residuary estate, does she use appropriate legal terms. But when we come to the clause in question, we find her using this language: she expresses her confidence that *Harrison* will give "the bulk of my said residuary estate." Now what she there meant could not be her residuary estate, which she had already in clear terms given; but the bulk of it. Then it is said that word is to be construed by the clause for providing for the widow; and that what is intended is, to give a power to make provision for the widow, and then the bulk means what remains; or else that it means a provision for the widow for life out of the income, and then the word bulk means the corpus of the estate. But the answer is, that as to either of these constructions the term bulk is not appropriate. No such term is used by the testatrix when giving capital as distinguished from income; nor is the term appropriate to express what remains after *Harrison* shall have exhausted some of the capital. What is the meaning then of bulk? The appropriate meaning, according to its derivation, is something which bulges out, &c. [His Honor referred to

*Todd's Johnson and Richardson's* Dictionary for the different meanings and etymology of the word.] Its popular meaning we all know. When a person is said to have given the bulk of his property, what is meant is not the whole but the greater part, and that is in fact consistent with its classical meaning. When, therefore, the testatrix uses that term, can I say she has used a term expressing a definite, clear, certain part of her estate, or the whole of her estate? I am bound to say she has not designated the subject as to which she expresses her confidence; and I am therefore of opinion that there is no trust created: that *Harrison* took absolutely, and those claiming under him now take.

1854.  
PALMER  
v.  
SIMMONDS.


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CADOGAN and Wife v. EARL OF ESSEX  
and Others.

1854 :  
7th March.  
Trusts  
for Investment.  
Power to Invest.

BY a deed dated the 28th day of November, 1851, being the settlement made on the marriage of the Plaintiff and his wife, it was provided that it should be lawful for the Defendants, the trustees of the settlement, or the survivors or survivor of them, or the executors or administrators of such survivor, or their or his assigns, and they and he were thereby *required* at any time or times during the lives or life of the said Plaintiffs *Frederick William Cadogan* and *Lady Adelaide Cadogan* or the survivor of them, with their, his or her approbation in writing under their, his or her hands or hand, to lay out and invest the several sums of 4,000*l.*, 10,000*l.* and 5,000*l.* in the settlement mentioned, or any of them, or the money to be produced by the sale, transfer or disposition of the stocks, funds or securities in or upon

By a deed, power was given to trustees, and they were *required*, with the approbation of the tenants for life, to invest in the purchase of leaseholds: Held, that it was compulsory on them to invest, when called upon to do so by the tenants for life.

1854.  
  
 CADOGAN  
 and Wife  
 v.  
 EARL OF ESSEX  
 and Others.

which the same respectively should for the time being be laid out or invested, or any part of such money, in the purchase of any freehold or copyhold manors, messuages, lands, tenements or other hereditaments in *England* or *Wales* for an estate of inheritance, or of any *leasehold* lands, messuages or tenements in *England* or *Wales* for any term of years (whereof not less than sixty years should be unexpired at the time of such purchase), and either with or without the production of the lessor's title, the freehold, copyhold or leasehold premises to be conveyed, surrendered and assigned to the said trustees, or the survivors or survivor of them, their or his heirs, executors, administrators or assigns respectively.

The Plaintiff, the husband, purchased at an auction certain leasehold premises, and having been advised that the title was good, he and his wife, by letter, requested the trustees to lay out part of the trust money in the purchase of it. The Defendants declined, and the question was whether they might, and whether they were bound to make such investment.

Mr. *Glasse* and Mr. *Lonsdale*, for the Plaintiffs, cited *Beauclerk v. Ashburnham* (a); *Lee v. Young* (b).

Mr. *Hobhouse*, *contra*.

There is a discretion in the trustees at any rate as to the selection of leaseholds; besides they object altogether. They object to enter into covenants, and the clause is only empowering; it is not imperative.

The VICE-CHANCELLOR :

I really think this case comes within *Beauclerk v.*

(a) 8 Beav. 322.

(b) 2 Y. & Coll. C. C. 532.

*Ashburnham*, though the words are not the same. It is clear that language is used which imports first a power or authority to the trustees to invest in the manner designated, which would give them a discretion; and then words are used to show that they are *required* to do it. Why should the second words be used except to express a different thing? The first gives an express authority to the trustees to do it; and the second does something more. I think that although there is a certain degree of doubt, the word used in the subsequent passage being "approbation" instead of "direction," the case falls within *Beauclerk v. Ashburnham*, and that the trustees are under an obligation; that the direction is imperative; and that if the tenant for life thinks fit to have the trust fund invested in the purchase of leaseholds, the trustees must adopt that investment.

I think also that leasehold houses come within the terms of the settlement.

1854.

CADOGAN  
and Wifev.  
EARL OF ESSEX  
and Others.



1854:  
February and  
21st March.

Words.

*Representatives.*  
*Personal*  
*Representatives.*

*In re CRAWFORD'S Trusts.*

Testator gave a life interest in certain funds, with remainder "to be equally divided between all my cousins german now existing, or their representatives:"

Held, there being nothing in the rest of the will to control the primary legal meaning of the word *representatives*, that it meant executors, and not next of kin; and the fund went to the executors or administrators of the testator's cousins german, as part of their personal estate.

Investigation of the authorities, and general doctrine on the construction of the word *representatives* in a will.

**JOHN CRAWFORD** made his will, bearing date the 29th of November, 1817, and after giving certain specific and pecuniary bequests, he devised and bequeathed as follows:—

"To my good friends *John Trotter* and *Coutts Trotter*, esquires, and to their executors, I leave all the residue of my property, to be by them held in trust, for the purpose of paying my daughter, *Elizabeth Jane*, all the interest arising therefrom during her natural life as they may receive it, or giving her powers of attorney to receive the same herself or any person for her, should they in their discretion so think fit. If she marries and leaves issue, one half of the said residue to be at her disposal at her death, to leave to whom she pleases, and the other half, on that event taking place, to go and belong to the child or children of her body, share and share alike. If she dies unmarried, or marrying, dies without leaving issue, then and in that case the whole of the said residue to be divided as follows: one third part thereof to be at the disposal of my said daughter, or as her will may direct; one third to my sister, Mrs. *Marion Jobson*, of *Dundee*, the interest to be paid to her during her life, and the principal at her death to go to the heirs of her body, share and share alike; one twelfth to my brother, *Charles Crawford*, and to the heirs of his body; one twelfth to my niece, Miss *Ellen Mayne*, in the same manner as stated in the 5th article; one twelfth to Miss *Elizabeth Graham*, Mrs. *Margaret Fletcher* and Lady *Scott*, of *Ancrum*, share and share alike, and to their respective

heirs; *one twelfth to be equally divided amongst all my cousins german now existing, or their representatives.* I hereby appoint as executors to this my last will and testament my good friends *John Trotter, Coutts Trotter and George Brown, Esqrs.*"

1854.  
  
*In re*  
**CRAWFORD'S**  
*Trusts.*

The testator died on the 2nd of May, 1818, leaving his daughter, *Eliza Jane Crawford*, surviving.

*Eliza Jane Crawford* died on the 24th of November, 1846, without having been married, and in the month of December, 1847, under the provisions of the Trustees Relief Act, the executors paid into Court, to the account of "The trust funds come to the hands of the personal representatives of *John Crawford, Esq.*, deceased," the sum of 14,605*l.*, three pounds per centum reduced bank annuities; 8,689*l.* 14*s.*, three pounds per centum consolidated bank annuities; 6,533*l.*, 18*s.* 11*d.*, three pounds five shillings per centum bank annuities; 625*l.*, bank stock, and the sum of 573*l.* 3*s.* 1*d.*, cash, being the sums remaining in their hands on account of the residuary personal estate of the testator.

There were six cousins german of the testator living at the date of his will: they all died after the testator's death, and living *Eliza Jane Crawford*.

The petition was presented by the legal personal representative of one of the cousins german, praying for payment to him of his share, and the payment to the legal personal representatives of the other deceased cousins german, of their shares. And the question was, whether that was the proper construction of the testator's will, or whether the next of kin, according to the Statute of Distribution, of the deceased cousins german, were the persons entitled.

1854.

Mr. *Cotton* appeared for the petitioner.

*In re*  
CRAWFORD'S  
Trusts.

Mr. *Amphlett* for the next of kin.

Mr. *Hobhouse* for the surviving representative of the original testator.

*Judgment.*

On the 21st March the VICE-CHANCELLOR delivered the following judgment:—

In this case the testator *John Crawford* bequeathed to *J. Trotter* and *Coutts Trotter*, and to their executors, the residue of his property, in trust, to pay to his daughter, *Elizabeth Jane*, all the interest arising therefrom during her life, and if she married and left issue, one half of such residue to be at her disposal, and the other half to go and belong to her children, share and share alike; but if she died unmarried, or without having issue (which event happened), the whole of the residue was to be divided as follows: the testator then proceeded to dispose of it in various shares to various persons, and as to one-twelfth, he gave it in these words: "One twelfth to be equally divided amongst all my cousins german now existing, or their representatives." The Master has found that there were six cousins german living at the date of the will, all of whom survived the testator, but all died before the testator's daughter, *Elizabeth Jane*, the tenant for life. She having now died without having been married, I have to decide who are entitled to this twelfth part of the residue, which has been brought into Court under the Trustee Relief Act.

The contest lies between the respective executors and administrators of the cousins german on the one hand, and their respective next of kin on the other hand.

The question is, in what sense has the testator here used the term "representatives."

1854.

*In re*  
CRAWFORD'S  
Trusts.

There is no doubt that this term is capable of being interpreted in any sense in which the Court may be satisfied, from the whole context of the will, that the testator intended to use it; and the cases are numerous in which it has been held to mean one thing or another, according to the indications, collected from the whole will, of the testator's intention in using it.

There is, however, one rule of construction, of universal application, which admits of no exception, and which ought never, under any circumstances, to be departed from, viz., that if any term is used by a testator which has a primary or ordinary legal meaning, *that* is the sense in which it ought to be construed, unless the Court is reasonably satisfied, by evidence to be collected from the will itself, of the testator's intention to use it, not in that sense, but in some different sense.

It follows, from this rule, that in every case in which a question is raised as to the meaning to be attributed to any particular term used by a testator, the first thing to be done is to ascertain and fix its primary or ordinary legal meaning, and when that is ascertained, the onus lies on the party who insists on attributing to it a different meaning, to point out the evidence (if any) which the will furnishes, to show the testator's intention to use the term in such different sense, and not according to its ordinary acceptance.

Moreover, it is to be observed that slight and trivial circumstances are not sufficient to afford such evidence of

1854.  
  
*In re*  
 CRAWFORD'S  
*Trusts.*

intention. In *Attorney-General v. Malkin (a)*, Lord *Cottenham*, propounding a general rule, though he was applying it in a case where the term used was different from that occurring in the present case, expresses himself thus: "I cannot, however, abstain from observing that such evidence ought to be very strong to justify a construction inconsistent with the ordinary and legal meaning of the words used. That such cases may exist cannot be doubted; for the words being only the media through which the meaning is conveyed, it is immaterial what words are used, if we are sufficiently informed what meaning they are intended to bear; but the actual probability that the author of the instrument intended that the words used should be understood according to their ordinary and legal meaning, is so strong, that slight circumstances cannot be considered as sufficient evidence of a contrary intention. Too easy a departure from the ordinary meaning leads to uncertainty, and tends to make every case the subject of unsatisfactory speculation as to the author's intention."

To the rules I have thus referred to, the authority of which cannot be disputed, any more than their good sense and practical utility, it is my intention to adhere.

What, then, is the ordinary and legal meaning of the term "representatives?" Whom does the law regard as properly *representing* a deceased person with reference to personal property? Certainly his executors or administrators. They *represent* his person; they *represent* him in respect of his personal estate. The doctrine of the executor properly representing his testator is as old as the law itself. *Littleton (b)* says, "The executors *repre-*

(a) 2 Phil. 68.

(b) Sect. 337.

*sent* the person of their testator." And Lord *Coke*, commenting on that passage (a), says, "This is to be understood concerning goods and chattels either in possession or reversion; and the executor doth more actually *represent* the person of the testator, than the heir doth the person of the ancestor." And having illustrated this proposition by an instance, he adds, "Furthermore, here the administrators, and the ordinary also, are implied." No doubt the full expression commonly employed to designate executors or administrators is "legal personal representatives." But the words "legal" and "personal" are not essential to that designation. The word "legal," when added to representatives, only means the representatives recognized by law, and does not designate different persons from those who would be intended by the single word "representatives," any more than the term "legal heirs," describes different persons from those who would be designated by the single word "heirs." And the term "personal," when added to representatives, imports nothing more than that the representatives intended are the representatives of the deceased in respect of personal property. In several cases, some of which I shall have occasion presently to mention, the words "legal representatives," without the words "personal," and the words "personal representatives" without the word "legal" have equally been judicially determined to be terms, the ordinary legal sense of which is executors or administrators. And so it appears to me that the ordinary legal sense of the term "representatives," without the addition of "legal" or "personal," is executors or administrators. It will be observed that the question at this moment under consideration is not whether the use of the full description "legal personal representatives" may not

1854.

*In re*  
CRAWFORD'S  
Trusts.

(a) Co. Litt. 209 a.

1854.  
  
*In re*  
 CRAWFORD'S  
*Trusts.*

make it more certain and unquestionable whom the testator meant to designate, than the use of the single term "representatives," but simply what is the primary, or proper, or ordinary and legal meaning of the word "representatives."

Now, although the term "representatives" may be construed to mean "next of kin," if it appears that the testator intended to use it in that sense, I take it to be clear that that is not its primary or ordinary legal meaning. It must be observed, that in the cases in which that term has been construed "next of kin," it has been held to mean the persons who would be entitled to his personal estate by virtue of the Statute of Distributions, in case he had died intestate (*Booth v. Vicars* (a); *Smith v. Palmer* (b)). Such persons do not, properly speaking, *represent* the deceased in any respect whatever. They are not *necessarily* his representatives in respect of blood, for the class may include persons standing in different degrees of consanguinity to the deceased, and even the wife will be included, though not related at all in blood. See *Smith v. Palmer* (b). Nor do they represent him in respect of his personal estate; for they are not the parties against whom a creditor or other person having a demand against the testator must bring his action or file his bill to recover his debt or demand; and although they are entitled to receive from the representatives of the deceased, dying intestate, the clear surplus of his personal estate, after payment of all the funeral and testamentary expenses, debts and legacies, such right is merely conferred on them by statute, and after all is no better right than that of a residuary legatee.

The conclusion therefore is, that the ordinary and

(a) 1 Coll. 6.

(b) 7 Hare, 225.

legal meaning of the term "representatives" is, not "next of kin," but "executors or administrators," and that is the sense in which the testator must be considered to have used it, unless the will affords evidence sufficient to satisfy the Court that he intended to use it in a different sense. Accordingly, in several cases, the term "representatives" or any other similar term, has been held to mean executors or administrators.

1854.  
  
*In re*  
**CRAWFORD'S**  
*Trusts.*

The nearest case to the present is *Corbyn v. French*(a). There a testator bequeathed his personal estate in trust for his wife for her life, and at her decease, he bequeathed to each of his sister's children, viz., *John, Dorothy, William and Christopher, or their representatives or representative, 2,000l.* *John* died before the testator; *Christopher* survived the testator, but died before the tenant for life. The case of *Christopher* was precisely, and in terms, the present case. The bequest was after a previous life estate, and the gift was to him or his representatives or representative. And Lord *Alvanley* decided that the gift to *Christopher* was good, and passed to his executors or administrators. The legacy to *John*, who had died before the testator, was held to have lapsed. And his lordship observed, that if *Elizabeth Cooper* had died in the testator's lifetime, her legacy would also have lapsed. Here, then, was a clear decision that where a legacy is given to a man, or his representatives or representative, after a previous life estate, the term "representatives" is to be construed "executors or administrators," and that the term "proper representatives" must receive the same construction.

This case is the more conclusive on the point, because

(a) 4 Ves. 418.



1854.  
  
*In re*  
 CRAWFORD'S  
*Trusts.*

it was decided by the same judge who a few years before, in *Bridge v. Abbott* (which I shall have occasion to notice presently), where there was no life estate, had held words very similar to mean next of kin according to the Statute of Distributions.

In *Price v. Strange (a)*, the testator devised real estate in trust for his wife for her life or widowhood; with a direction, after her death or second marriage, to sell the property and divide the proceeds among such of his children as should be then living, and the *legal representative or representatives* of such of them as should be then dead, share and share alike. Sir *John Leach* said, "It is a sound rule of construction to understand words in their ordinary sense, unless controlled by a different intention appearing upon the whole instrument. The ordinary sense of legal representatives is executors or administrators." And he decided that, as there was not enough to show any different intention, that was the meaning to be attributed to them.

The same meaning was attributed by Sir *John Leach* to the words *personal representatives*, in *Saberton v. Sheels (b)*, which I refer to, although the limitation was different from that in the present case. There the testator gave 1,000*l.* to each of his daughters, with a direction that each legacy should be invested in the names of his trustees and the daughter, the interest to be paid to the daughter for her life for her separate use; and at her death to pass according to her will; and for want thereof, to go to her *personal representatives*. One of the daughters died, leaving a husband and children, and the husband took out administration to her. Sir *John*

(a) 6 Madd. 149.

(b) 1 Russ. & Myl. 587.

*Leach* said, "All words are to be used in their ordinary sense, unless controlled by the context of the will. The ordinary sense of the words 'personal representatives' is executors or administrators." And he decided that the fund belonged to the husband and administrator.

1854.  
  
*In re*  
**CRAWFORD'S**  
*Trusts.*

In *Hinchcliffe v. Westwood* (a), the testator gave 1,000*l.* in trust, to pay the interest to his daughter, *Mary Westwood*, for life, with a limitation to her children; but if she should die without leaving issue (which event happened), then to pay and divide the 1,000*l.* equally amongst the testator's sons, *Thomas, Richard* and *John Westwood*, share and share alike; but in case of the decease of all or any of them in the lifetime of the daughter, he gave the share or shares of him or them so dying to his or their *legal personal representative or representatives*. Two of the sons having died in the lifetime of the tenant for life, the Lord Justice *Knight Bruce*, then Vice-Chancellor, held that their shares belonged to their executors and administrators, and not to their next of kin.

These cases are sufficient to establish the proposition that the ordinary legal meaning of each of the terms "representatives," "legal representatives" and "personal representatives," as well as of the term "legal personal representatives," when used with respect to personalty, is, not next of kin, but executors and administrators.

The following are cases in which the Court found in the will sufficient evidence of the testator's intention to use the term other than in its ordinary legal sense. In *Booth v. Vicars* (b), the testator gave his residuary personal estate in trust, to pay the income to his wife for

(a) 2 De Gex & Sma. 216.

(b) 1 Coll. 6.

1854.

*In re*  
CRAWFORD'S  
Trusts.

life, and after her death to be assigned to and to go and be paid to *Nicholas Vicars* and *Mary Brown* equally, share and share alike, if then living ; but if dead, to go and be equally divided to and amongst their respective *next legal representatives*, share and share alike. *Nicholas Vicars* and *Mary Brown* both died before the wife. Here the word "next," which was added to the words "legal representatives," was a term having no connection with the character of executors or administrators, and was sufficient to show that the testator used the language to designate the next of kin. And the Vice-Chancellor *Knight Bruce* so decided.

So in *Smith v. Palmer* (a), a testator gave his real and personal estate in trust for his wife for life, and directed that at her death the real estate should be sold, and the proceeds, with the personal estate, be paid and divided thus : one-third to *James Strachan*, if then living ; but if he should be then dead, to his *legal representative or representatives*, if more than one, *share and share alike* ; and the other two-thirds to two other persons respectively in the same words. Here the direction that the legal representatives should take, *share and share alike*, was sufficient evidence of the testator's intention to use the words "legal representatives" in a different sense from the ordinary acceptance of executors or administrators ; and *James Strachan* having died in the lifetime of the tenant for life, the Vice-Chancellor *Wigram* decided that his third belonged to the persons who, according to the Statute of Distributions, would be entitled to his personal estate.

Again, in *Walker v. Marquis of Camden* (b), the testator gave the residue of his real and personal estate to trus-

(a) 7 Hare, 225.

(b) 16 Simons, 329.

tees, in trust for his son *William Palmer* for life, with a limitation for the benefit of the son's children, their heirs, executors or administrators; but if he died without leaving any child (which event happened), then to sell all the property, and divide and pay the produce as follows: one-fourth to *Anthony Palmer*, if then living; and if not, then to his *legal representative or representatives*; and the other three-fourths to three other persons respectively in the same words. The Vice-Chancellor of *England* held the words to mean "next of kin," and not "executors and administrators," on the ground that the words "executors and administrators" occurred five times in other parts of the will, and therefore his Honor thought the words "legal representative or representatives" must have been used by the testator in a different sense. Whether this ought to have been held sufficient evidence of the testator's intention to use the words "legal representative or representatives" in a different sense from their ordinary legal acceptance, may perhaps be doubted; especially as the words "executors or administrators" were never used by the testator with reference to any person taking a beneficial interest under the will, but only with reference to the trustees, except in the one place above mentioned; and he never used them except in connection with the word "heirs;" that is, in directing his trustees what they were to do in the execution of the trusts, he several times used the words "my said trustees, or the survivors or survivor of them, or the heirs, executors or administrators of such survivor." But whatever opinion may be entertained on that point, the case entirely illustrates the principle, even supposing it to have been erroneously applied.

1854.

*In re*  
CRAWFORD'S  
Trusts.

The cases I have hitherto mentioned (with the exception of *Saberton v. Skeels*, where the form of the bequest

1854.

*In re*  
CRAWFORD'S  
Trusts.

was altogether different from that in the present case) were all cases where the gift to the legatee or his representatives (or his legal representatives, or personal representatives, or legal personal representatives) was to take effect *after a previous life estate*, i.e. where the testator was contemplating and providing for the event of the legatee surviving him (the testator), but dying in the lifetime of the tenant for life. In any such case there is no improbability in supposing the testator to have intended that the legacy should go to the legatee's executors or administrators as part of his personal estate; for then the legatee gets the benefit of the bequest as a reversionary legacy, though he may not live to receive it. But where the legacy or gift is immediate, without any prior life estate, as where the testator gives a legacy or personal fund to A. or his "legal representatives," he is contemplating and providing for the event of the intended legatee dying in his (the testator's) lifetime. In such event the intended legatee could not, under any construction which could be put on the words "legal representatives," derive any advantage from the bequest; indeed, he would never even know of the bounty or provision made for him by the testator's will, so as to exercise any judgment as to the best mode of disposing of it as part of his own property, or to make any arrangement or disposition of his property with reference to it; and therefore it is highly improbable that the testator should intend that, if the intended legatee should die in his lifetime, the legacy should go to his executors or administrators as part of the legatee's general assets, perhaps to benefit no one but the legatee's creditors. And this improbability is such as to furnish sufficient evidence, where the gift to A. or his legal representatives is immediate (i.e. without any prior life estate), of the testator's intention to use the term "representatives" not in its ordinary

legal sense, but as designating the persons who by virtue of the Statute of Distributions would be entitled to A.'s personal estate, if he had died intestate.

1854.  
  
*In re*  
 CRAWFORD'S  
*Trusts.*

Thus in *Bridge v. Abbott* (a), a testatrix gave her residuary personal estate to eight persons, equally to be divided among them, share and share alike; and she directed that, in case of the death of any of them before her (the testatrix), the share or shares of him or them so dying before her should go to his or their *legal representatives*. One of them died before the testatrix; and Lord *Alvanley* decreed that his share belonged to his next of kin, according to the Statute of Distributions.

So in *Cotton v. Cotton* (b), the testator directed that his residuary estate should be divided in certain proportions among twelve persons, or their *legal representatives*. One having died before the testator, Lord *Langdale* decided in favour of the next of kin, according to the statute.

These two cases, so far from being at variance with those before mentioned, in which the term "representatives," or "legal representatives," was held to mean executors or administrators, are, in fact, like them, consistent illustrations of the same principle. In *Corbyn v. French*, *Price v. Strange*, *Sabeton v. Skeels* and *Hinchcliffe v. Westwood*, the will afforded no sufficient evidence that the testator intended to use the term otherwise than according to its ordinary legal meaning, and therefore it was held to designate executors and administrators. In *Booth v. Vicars*, *Smith v. Palmer* and *Walker v. Marquis of Camden*, the Court discovered, from certain expressions in the will, sufficient evidence of the testator's intention to use the term in a sense diffe-

(a) 3 Bro. C. C. 224.

(b) 2 Beav. 67.

1854.

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In re  
CRAWFORD'S  
Trusts.

rent from its ordinary legal meaning, and therefore held it to mean next of kin. And in *Bridge v. Abbott* and *Cotton v. Cotton* the circumstance that the gift was immediate, without any prior life estate; i.e. that the testator was providing for the event of the intended legatee dying in his lifetime, was held to afford sufficient evidence of the testator's intention to use the term "legal representatives" in a sense different from that of executors or administrators, by reason of the very great improbability that the testator should mean the legacy to be thrown, without specific object and without any benefit to the intended legatee, into the general assets of the legatee dying before him; and therefore the term was held to have been used by the testator in the sense of next of kin.

I think it will tend to illustrate my view of the subject to place the two cases of *Bridge v. Abbott* and *Corbyn v. French* side by side, because they were decided by the same most eminent and learned judge, and because the two cases were in their circumstances substantially the same in all respects but one, and the one point of difference was, that in the former the gift was immediate, and in the latter it was to take effect after a life estate. Why did Lord *Alvanley* decide in the former that the term "legal representatives" meant next of kin according to the statute, and in the latter that the term "representatives" meant executors or administrators? Not because, when he decided the case of *Corbyn v. French*, in 1799, he had forgotten his decision in *Bridge v. Abbott*, in 1791, for that case was cited in *Corbyn v. French*. Not because the word "legal" was used by the testatrix in the first case, and omitted by the testator in the second; for no one, I think, will contend that the term "representatives," in its ordinary legal acceptance, more

clearly and certainly means executors and administrators than the term "legal representatives," or that the primary and proper meaning of "legal representatives" is next of kin, while the primary and proper meaning of "representatives" is executors and administrators. The reason for the different decisions is declared by Lord *Alvanley* himself. In *Bridge v. Abbott*, where, the gift being immediate, the testatrix was providing for the event of the legatee dying in her own lifetime, his lordship states the grounds for concluding that she could not be supposed to intend, in that event, to give the fund to his executors or administrators, either beneficially or as part of his assets; and in *Corbyn v. French* he puts the distinction expressly upon the circumstance that the gift was not immediate, as in *Bridge v. Abbott*, but to take effect after a life estate; so that there was an interval after the testator's death, in which the legatee might die; and though it vested, he might not live to receive it. Now it would be perfectly possible for a testator giving a legacy to A., after the death of a tenant for life, to direct that if the legatee should die before the tenant for life, the legacy should go to the legatee's next of kin: there would be nothing strange or unnatural in such an intention. Why then did not Lord *Alvanley* hold that to be the sense in which the testator used the term "representatives" in *Corbyn v. French*, as he did in *Bridge v. Abbott*? Because that is not its ordinary legal meaning; and inasmuch as the gift was not immediate, but to take effect after a life estate, the will did not afford evidence of the testator's intention to use the term otherwise than in its ordinary legal sense of executors and administrators. Whereas in *Bridge v. Abbott*, the gift being immediate, that afforded sufficient evidence of the testator's intention to use the term in a different sense from its ordinary legal acceptance.

1854.

*In re*  
CRAWFORD'S  
Trusts.



1854.

*In re*  
CRAWFORD'S  
Trusts.

Having stated the principles which I think ought to govern all cases of this description, principles with which all the decided cases that I am aware of are perfectly consistent, it remains only to apply them to the case now before me. In this bequest of one-twelfth of the residue to the cousins german, or their representatives, the term "representatives" must be construed executors or administrators, which is its ordinary legal meaning, unless the will furnishes sufficient evidence of the testator's intention to use it in a different sense. As the gift is to take effect after a previous life estate, there is no such improbability in supposing that the testator meant the legacy to be received by the executors or administrators of the legatee as part of his general estate, as there would be if the gift were immediate. Does the will afford any other evidence of the testator's intention to use the term "representatives" otherwise than in its ordinary legal sense of executors or administrators? I find none. The words "executors or administrators" do not occur in the will. It is true the word "executors" does once occur; but that is only in the gift of the residue to the trustees, where he uses this language, "To my good friends *John Trotter* and *Coutts Trotter*, and to *their executors*, I leave all the residue of my property, to be by them held in trust, &c.," the word "executors" standing alone, without the word "administrators." And, therefore, even supposing *Walker v. Marquis of Camden* to have been rightly decided, I am of opinion that the mere occurrence of the word "executors" by itself, in the bequest to the trustees, affords no sufficient evidence of the testator's intention to use the term "representatives" otherwise than in the sense of executors or administrators. If I were to hold otherwise, I should be contravening the principle I have before referred to, as laid down by Lord *Cottenham* in *Attorney-General v. Mulkin*,—that slight circumstances

ought not to be considered as affording sufficient evidence of the testator's intention to use the term which he has chosen to employ otherwise than in its ordinary legal sense. And as I cannot discover in the will any other evidence of such intention, I must construe the term "representatives" in its ordinary legal sense of executors and administrators.

1854.  
  
*In re*  
**CRAWFORD'S**  
*Trusts.*

Let the fund in Court, which represents the one-twelfth of the residue, be divided in equal sixth shares among the executors or administrators of the six cousins german named in the Master's report, to be by them respectively applied as part of the general personal estate of their respective testators or intestates.

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1854.  
8 and 9th  
March.

Pleading.  
Misjoinder.  
Right to Sue.  
Personal  
Representative.  
Heir-at-law.  
Title.

*N. and C., the daughters of M., were jointly indebted to S., and the debt was secured by a deposit of title deeds of property belonging to C. M. appointed N. her executrix. Part of her property consisted of a*

*mortgage debt, and after her will she purchased some real estate, which descended to N. and C. N. died, leaving a large amount of M.'s debts unpaid, and she made the Plaintiff her executrix, so that the Plaintiff was personal representative both of M. and of N. After the death of M., N. and C. borrowed of S. money on a deposit of the title deeds, by which M.'s mortgage debt was secured, and of the title deeds of the real estate descended to N. and C. S. knew that the money was only partially wanted for the purposes of M.'s estate. There had been another suit to administer the estate of M., and a decree in that suit; and part of the real estate of M. sold on a bill by the Plaintiff against S. seeking to recover the title deeds deposited.*

*Held, 1st. That the Plaintiff was not incapable of suing by being the representative of N., who, it was admitted, could not have sustained a bill.*

*2. That, though only personal representative of M., she could, under the circumstances, sue in respect both of her real and personal estate.*


*3. That the mortgage by N. and C., as the heiresses of M., did not relieve the purchaser from the suit of M.'s representative.*

*4. That as to the claim of S. that would depend on the result of an inquiry what part of the money advanced had been applied for the purposes of M.'s estate.*

### CARTER v. SANDERS.

**MARY EASTABROOK** made her will on the 17th July, 1830. She directed her debts and testamentary and funeral expenses to be paid. She gave certain real estate to *John Norris*. She gave to *I. Norris* and her daughter *Nancy Eastabrook* an annuity of 80*l.* a year during the life of her daughter *M. A. Carter*, payable out of her real and personal estate, and to be paid to her daughter *M. A. Carter* for her life. She gave the residue of her property, real and personal, to her daughter *Nancy Eastabrook*, her heirs, executors, administrators and assigns, subject to the charges created by her will, for her and their absolute use, benefit and disposal; and she appointed *Nancy Eastabrook* executrix of her will.

The testatrix died on the 16th August, 1843, and her will was duly proved by *Nancy Eastabrook*. The testatrix at the time of her decease was possessed of some personal estate, but not enough to pay her debts and funeral and testamentary expenses: part of it was a mortgage debt of 900*l.* secured on premises, partly freehold, partly leasehold, in *St. Martin's* parish, *Exeter*. After the date of her will, the testatrix purchased some real estate at *Tawton* in *Devonshire*, and which descended to her two daughters *Mary Ann Carter* and *Nancy Eastabrook*, as her co-heiresses at law.

1854.  
  
 CARTER  
 v.  
 SANDERS.

*Nancy Eastabrook* paid the funeral and testamentary expenses of the testatrix out of her personal estate; but a large amount of her debts remained unpaid at the date of her will. She made her will on the 30th March, 1844, and made the Plaintiff her sole executrix. She died on the 19th May, 1844; the Plaintiff therefore became the personal representative both of *Mary Eastabrook* and *Nancy Eastabrook*.

The Defendants *Sanders*, *Barnes* and *Sanders* were bankers, with whom *M. A. Carter* and *Nancy Eastabrook*, before the 9th February, 1844, deposited, for securing 589*l.* 17*s.* 2*d.* due from them, the title deeds of the *Tawton* estate, and of other real estate belonging exclusively to *M. A. Carter*.

Before the 9th February, the Defendants made a further advance of 310*l.* 2*s.* 10*d.* to *M. A. Carter* and *Nancy Eastabrook*, on a deposit, accompanied by a memorandum, of the mortgage deeds of the *St. Martin's* property; and at the same time *M. A. Carter* and *Nancy Eastabrook* gave their joint and several promissory note for 900*l.*

1854.  
CARTER  
v.  
SANDERS.

The bill alleged that the real facts as to the advances were as follows:—That at the time of the death of the testatrix *Mary Eastabrook*, *Nancy Eastabrook* and *Mary Ann Carter* were jointly and severally indebted to the Defendants *Sanders & Co.* in 749*l.* 17*s.* 2*d.* on their private accounts. The debt was by simple contract, and was secured by deposit by way of equitable mortgage, of the deeds of some property belonging to the said *Mary Ann Carter* in *St. Sidwells, Exeter*. This debt was subsequently reduced by the payment of 160*l.* to 589*l.* 17*s.* 2*d.* Shortly after the decease of the testatrix *Mary Eastabrook*, Messrs. *Sanders & Co.* brought an action against *Nancy Eastabrook* and *Mary Ann Carter* for the said debt of 589*l.* 17*s.* 2*d.*, and were in a situation to sign judgment and issue execution against them. To prevent this, *Sanders & Co.* required further security or payment, and thereupon *Nancy Eastabrook* deposited with *Sanders & Co.* as a further security for the private debt of herself and the said *Mary Ann Carter*, the title deeds of the hereditaments and premises at *South Tawton* purchased by the said testatrix *Mary Eastabrook* after the date of her said will. Shortly previous to the 9th day of February, 1844, *Nancy Eastabrook* was again pressed by the said Messrs. *Sanders & Co.* for payment, and as she was unable to make any payment and required a further advance, *Sanders & Co.* agreed to lend her a further sum, 310*l.* 2*s.* 10*d.*, on the security of the joint promissory note of herself and the said *Mary Ann Carter*, dated the 9th day of February, 1844, and the deposit of the title deeds of the said property in *St. Martin's-in-the-Close*, and the execution by her of the memorandum of deposit dated the 9th day of February, 1844.

That the debts of the testatrix *Mary Eastabrook* re-

mained unpaid, and her testamentary expenses and the arrears of the said annuity and interest thereon were greater in amount than the whole of her personal estate when got in, and her real estate when sold, would be sufficient to satisfy. The monies advanced to the said *Nancy Eastabrook* by *Sanders & Co.* on the security of the title deeds of the said hereditaments and premises at *South Tawton*, and of the said premises in *St. Martin's, Exeter*, were so advanced for her own private purposes, and not for the purposes of paying the debts of the testatrix *Mary Eastabrook*; and Messrs. *Sanders & Co.* made no advances to her in her character of executrix of the said *Mary Eastabrook*, and well knew when such advances were made that the monies advanced to her were borrowed by her for her own purposes and not for the purpose of being applied in paying the debts of the testatrix, or otherwise in the administration of the testatrix's estate.

The bill prayed that it might be declared that, as against the creditors of *Mary Eastabrook* the testatrix, the Defendants *Sanders & Co.* were not entitled to hold the title deeds of the premises at *Tawton* and of the *St. Martin's* premises as security for their advances to *Nancy Eastabrook* and *Mary Ann Carter*, or either of them, and that they might deliver them up. The answer admitted, as to the advances, that the Defendants understood that part was wanted, and they believed it was applied, by *Nancy Eastabrook* for the purposes of the estate; but it did not identify how much. The remaining material facts appear on the judgment.

Mr. *Glasse* and Mr. *T. H. Terrell* for the Plaintiff, stated the case.

1854.  
 ~~~~~  
 CARTER  
 v.  
 SANDERS.

Mr. *J. Baily* and *J. V. Prior* for the Defendants.

1st. The Plaintiff cannot file a bill at all, being the representative of *Nancy Eastabrook*.

2ndly. As *personal representative only*, she has no right to file a bill seeking relief as to the real estate of the testator.

3rdly. The alienation by the heiresses is good, and the remedy, if any, is against the heiresses, not against the purchasers.

4thly. If there were abundance of assets, there would be no case. Now it is not shown that there will be any deficiency of assets; and unless that is shown, the Plaintiff cannot sustain this bill.

On the first point, the act complained of, is the act of *Nancy Eastbrook*. Now she was sole representative of the testatrix. She died and made her will, and appointed *M. S. Carter*, the Plaintiff, her executrix. *M. S. Carter* is exactly in the position of *Nancy Eastbrook*: she is only representative of the original testatrix as a consequence of law. This is not the union of two distinct characters. Where that is the case, we must admit that the union does not prevent the right of suit. That is the case of *Miles v. Durnford* (a). There *Miles* took out administration to *Punter*; he filled two independent characters. That is a very different case from this. Here the Plaintiff does not fill two characters. The Plaintiff is only the personal representative of the testatrix, because she is the personal representative of *Nancy Eastbrook*. She cannot therefore be in a better position than *Nancy Eastbrook* herself. If *Nancy Eastbrook* were alive, clearly

(a) 2 M'N. & Gor. 641.

she could not file a bill. Then her death cannot give a right to her representative. In *Miles v. Durnford* the Plaintiff might originally have filed a bill. Here the person represented never could have filed a bill.

1854.  
CARTER  
v.  
SANDERS.

Next, the Plaintiff cannot sustain any claim to relief as to the real estate; she sues as personal representative only of the testatrix. How can she file a bill relating to her real estate? for that is what is really being done here; the Plaintiff, as personal representative, is trying to get a part of the testatrix's real estate applied. What has the personal representative to do with the real estate? She is not responsible for and has no interest in it.

3rdly. Here the real estate has been disposed of by the *heireses-at-law* of the testatrix; if there is any remedy it is against *them*, not against the *purchaser*, who is not to be disturbed. A marriage settlement, for instance, by an heir, is good against creditors, the remedy left being against the heir: *Spackman v. Timbrell* (a); *Tubby v. Tubby* (b); *Richardson v. Horton* (c).

4thly. It is not suggested that there is any deficiency for the payment of anything except the 80*l.* annuity. By the draft report it appears that the arrears of the annuity are 930*l.* There is no attempt to show that any money is wanted except for this 930*l.* There is no deficiency for paying any other legal creditors or debts. The 930*l.* must of course be postponed to the Defendant's claim; and to follow assets into the hands of a purchaser from an executor, you must show that some other person than the executor will be injured.

(a) 8 Sim. 253.

(b) 2 Col. 136.

(c) 7 Beav. 120.



1854.  
~  
CARTER  
v.  
SANDERS.

Lastly as to the powers of the executrix. The power of executors generally to pledge the assets for the purposes of the estate, is unquestioned. Now here the deposit by the executrix of part of the personal estate, was for the purpose of securing 900*l*. Now I do not say that as to the whole of that sum we can hold it, but we can for all that which was advanced after the testatrix's death.

[The VICE-CHANCELLOR.—There is on this point this peculiarity; the party lending the money had it represented to him that the executrix was borrowing only as to part for the estate; as to part, for her own personal purposes. The question is, whether it is not incumbent on the party lending to show how much was wanted for the purposes of the estate.]

Mr. Welch, for *Mary Ann Carter*.

Mr. Glasse replied.

The VICE-CHANCELLOR :

The first question is, whether the Plaintiff is entitled to sustain the bill at all, regard being had to the fact that she is the representative of *Nancy Eastabrook*. And although it is true that she is the representative of *Mary Eastabrook*, she is only such representative by being the representative of *Nancy Eastabrook*. And it is said that, as *Nancy Eastabrook* herself could not have instituted this suit as against her own acts, so her representative, as such, could not have instituted it. Now if this had stood under the old law as to misjoinder, supposing *Miles v. Durnford*, as decided by me, to have been applicable, this suit could not be sustained by the present Plaintiff, and on this ground:—Supposing the repre-

representatives of *Mary Eastabrook* and *Nancy Eastabrook* were different persons, it is clear that there would have been such a conflicting interest as would have made it not right, under the old practice, to join them as Plaintiffs. Since my decision in *Miles v. Durnford*, and before the case came on for re-hearing before the Lords Justices, the act of parliament had passed which entirely altered the law as to misjoinder, and the language of the act has not left it to be said that a bill shall be dismissed for misjoinder. Whether that act was called to their lordships' attention in *Miles v. Durnford*, and whether they thought it was competent to the Plaintiff to sustain the bill under the act, or under the old law, I do not know. But all I have now to consider is whether, the law being so altered, the Plaintiff being the representative of a person who could not have sued, as well as of a person who could, this bill ought to be dismissed. I do not think the bill ought to be dismissed. The Plaintiff is the representative of *Mary*, and she is also representative of *Nancy*; and I do not think that, *Nancy* being dead, the circumstance of the person who continues her interest being joined with the representative of *Mary*, is a reason, as the law now stands, for dismissing the bill. If they were different persons, that would not be ground for dismissing the bill, and I do not think I ought to dismiss it because the two characters are united in one person.

The next objection is, that as the Plaintiff is only the legal personal representative of *Mary Eastabrook*, she can have no right as real representative, and cannot maintain the claim as to the title deeds of *Mary Eastabrook's* real estate. No doubt she has, as personal representative, nothing to do with the real estate; but where there is, as in this case, a suit to administer the real and

1854.

CARTER

v.

SANDERS.

1854.  
CARTER  
v.  
SANDERS.


personal estate, and a decree for the administration of the estate and for the sale of the real estate, the proceeds of which are applicable, in aid of the personal estate, to pay debts and legacies, or at all events debts; then, when it becomes necessary to get in *the proceeds* of the sale, it being admitted that proceedings for that purpose might fairly and properly be taken by legatees or even by the other creditors, it is the duty of the personal representative to see that the proceeds are got in, and she may fairly and properly represent all persons beneficially interested. I do not see what disorder or inconvenience could ensue by allowing the personal representative so to act, and there is, on the other hand, a great advantage in thus allowing one to sue on behalf of all. I think, therefore, that in this case I ought not to decree that the Plaintiff should not have relief as to the title deeds of *Mary Eastabrook's* real estate, supposing there were no objection on the other points.

As to the third objection, the personal representative of a creditor cannot, it is true, pursue the title deeds in the hands of an alienee, where the heir has conveyed the legal estate, or all the interest the heir had; but that principle does not apply to a case where the deeds were merely deposited with a creditor for advances.

The next question is, whether so much of the 300*l.* advanced to *Nancy Eastabrook* as was or might be applied to the payment of debts of her testatrix, ought to stand good. If it appeared that the money had been advanced to *Nancy Eastabrook*, as the representative of *Mary Eastabrook*, on a representation that it was wanted for debts, no doubt then to the full extent the bankers would be entitled to hold their security. But if *Nancy Eastabrook* had said that she wanted it for her

private purposes, there would have been no right on the part of the bankers to retain the security. What rule, then, is to be applied to the mean between these cases; that is, where it was simply said, I want you to lend me 300*l.*, 160*l.* of which is for the testatrix's debts? without saying for what the rest was wanted. What is the effect of that, supposing that representation to have been made? The bankers must have supposed that part was wanted for the estate, and the remainder for private purposes. The inference would be, that beyond 160*l.* the rest would be wanted for private purposes, or at least purposes independent of the testatrix's estate. What is represented by the banker's answer does not explain it, but raises a conjecture that as they advanced the money by two separate instalments, one of 160*l.* and the other of 140*l.*, it is very likely that the first advance was made on a representation that it was wanted for the estate. If the bankers require it, I will give them an enquiry on the subject. If it turns out that the representation made was, "I want you to lend me 300*l.*, and I want part of it for the testatrix's estate," and nothing more was said, that throws it on the *borrower* to show how much was wanted for the testatrix's estate; and what I should then direct, would be an enquiry how much was so applied.

The VICE-CHANCELLOR then disposed of other points in the case affecting the rights of the parties and the mode of working out the decree, but not involving any material questions of law.

1854.  
  
 CARTER  
 v.  
 SANDERS.

1854:  
23rd, 27th and  
29th March.

WILES v. GRESHAM.

*Trustees.*  
*Indemnity.*  
*Feme Coverte.*  
*Consent.*  
*Power.*

By a marriage settlement in 1834, the husband gave a bond for 2,000*l.* to the trustees, to be paid within six months of the marriage; to be left outstanding with the consent in writing of the wife and husband; and to

be called in with the like consent. Another debt of 4,000*l.* was included in the settlement. The 2,000*l.* was never got in. The husband became bankrupt in 1836; the trustees proved for the debt, but afterwards joined in a supersedeas, on the bankrupt guaranteeing to his creditors 16*s.* 6*d.* in the pound. The other creditors were so paid; the trustees never took their composition. In 1838 the wife and husband gave a written consent that the debt should remain out on the husband's bond. No other consent was ever given. The husband was again bankrupt in 1847. In 1834 the trustees had, at the instance of the husband (having no power to invest in the purchase of lands), purchased copyhold land and buildings with part of the 4,000*l.* The husband erected new and valuable buildings on the land at his own expense, increasing its value far more than 2,000*l.* There was no evidence to connect this outlay with the discharge of the bond debt: Held—

1st. That the trustees were liable for not getting in the money before 1836, if there was no consent.

2nd. That the wife's consent, in 1838, was not retrospective.

3rd. That the trustees could not be indemnified out of the increase of value of the land caused by the husband's outlay upon it.

ON the marriage of the Plaintiff, Mrs. *Wiles*, with *W. Wiles* (one of the Defendants), a settlement was made, dated the 5th March, 1833, of which *Barber*, *Cooper* and *W. R. Gresham*, another Defendant, were the trustees. It recited that Mrs. *Wiles* was entitled to 4,000*l.*, a debt from her brothers *R. Gresham* and *W. R. Gresham* (the Defendant); that it was agreed, in contemplation of the marriage, that the Defendant *Wiles* should by his bond secure to *Barber*, *Cooper* and *Gresham* 2,000*l.* with interest, upon the trusts thereafter declared; that *Wiles* had that day given to *Barber*, *Cooper* and *Gresham* his bond for payment of the 2,000*l.*, at or before the expiration of six months from the solemnization of the marriage. The debt of 4,000*l.* was assigned to

two of the trustees, *Barber* and *Cooper*, and it was declared that *Barber* and *Cooper* should stand possessed of the 4,000*l.* and of the 2,000*l.* in trust, *with the consent in writing* of *Mrs. Wiles* and her husband, or the survivor, to permit and suffer the said debts *to remain in their respective actual states of investment and security*, or with *such consent* to call in, convert and receive the said debts, and to lay out the monies when received on the usual securities, in the names of the *three* trustees. *Mrs. Wiles'* interest was settled to her separate use, without power of anticipation.

1854.  
WILES  
v.  
GRESHAM.

On the 10th July, 1834, a deed indorsed on the above deed was executed, appointing a new trustee, *Weston*, in lieu of *Barber*, deceased, to act jointly with *Cooper* and *Gresham* in respect of the 4,000*l.* and the 2,000*l.*, and *Cooper* assigned the debt of 4,000*l.* to one *Cutts*, to be by him assigned (as it was afterwards assigned) to *Cooper* and *Weston*. And *Cooper* and *Gresham* assigned the debt of 2,000*l.* and the bond to *Cutts*, to be by him assigned (as it was afterwards assigned) to *Cooper*, *Gresham* and *Weston*, on the trusts of the original settlement.

The bond debt was never paid by *Wiles*, the husband. It was alleged, and it appeared to be the fact, that down to the time of his bankruptcy, which took place on the 8th August, 1836, he could have well paid it. *Cooper*, *Weston* and *Gresham* proved for it under the fiat. In May, 1837, the fiat was annulled with the consent of the creditors, including the three trustees, who joined in a composition deed, and in the petition to annul the fiat, on being guaranteed 16*s.* 6*d.* in the pound. The composition was duly paid to all the creditors except the trustees; but they never called for any payment of their composition, but left the amount in the hands of *Wiles*.

1854.

WILES  
v.  
GRESHAM.

In January, 1847, *Wiles* again became bankrupt.

*Cooper* and *Weston* were dead at the time the bill was filed, and their representatives were *Charles Hill*, *W. Cator*, *E. Weston* and *R. Garland*, who were made Defendants. Their defence was, that the trustees had had the consent of Mrs. *Wiles* to the debt not being called in; for which they relied, first, on a recital in the deed of July, 1834, that the debt was then outstanding; and secondly, on a written consent given by Mrs. *Wiles*, dated the 14th March, 1838, which was drawn up in consequence of an application by the trustees to *Wiles* to pay, on which application he expressed his inability to pay.

The memorandum addressed to the trustees was as follows: "We the undersigned *W. Wiles* and *Dorothy* his wife do hereby declare that the sum of 2,000*l.* secured to be repaid to the trustees of the settlement made on our marriage by the bond of me, *W. Wiles*, has been permitted to remain in its present state of actual investment upon the security of the said bond, with our consent, and we do hereby request of you, the present trustees of our marriage settlement, to allow the said sum of 2,000*l.* still to remain in its present state of investment upon the security of the same bond. 14th March, 1838."

They further grounded their defence on the following facts. In April, 1834, *Wiles* was desirous of purchasing some copyhold property, houses and land, at *Kennington*, and the trustees purchased it out of part of the 4,000*l.*, taking an indemnity from *Wiles* and his wife, the powers of investing contained in the settlement, not extending to invest in the purchase of copyhold lands. The trustees were admitted. Afterwards, the houses were pulled down

and much better ones were built, at an expense of about 3,000*l.*, out of *Wiles'* monies. There was nothing to show any agreement that the money, or any part of it, was expended in satisfaction of the bond debt, or any intention on the part of *Wiles* or the trustees that it should be so considered.

1854.  
  
*WILES*  
*v.*  
*GRESHAM.*

The object of the suit was to declare the trustees liable, as guilty of breach of trust in not getting in the 2,000*l.* The cause now came on to be heard.

Mr. *Swanston* and Mr. *J. H. Palmer* for the Plaintiff.


*Wiles*, after the fiat on his first bankruptcy was annulled, went on in business until 1847. He was then bankrupt again. We say it was a breach of trust in the trustees not to call in the debt before the first bankruptcy; it was a further breach not taking care to get it in afterwards, while he was carrying on business. Instead of that, they let their share of the assets go back into his hands. Consent, consistent with the deed, is attempted to be set up by the answer; for that the Defendants rely on the recital in the deed appointing a new trustee in 1834. But that was no consent. But even if it were, in point of form, it could not exonerate the trustees from liability for neglecting to get in the money on the bankruptcy in 1836. [They cited *Boss v. Godsall* (a)]. There was no other consent, except the memorandum of 1838; but that memorandum was not obtained till after the breaches of trust had taken place. It was therefore too late; for the subsequent consent of Mrs. *Wiles* could not bind her, as she had no power of anticipation: *Bateman v. Davis* (b); *Cocher v. Quayle* (c). Besides, she was

(a) 1 Y. & Col. 617.

(c) 1 Russ. & Myl. 535.

(b) 3 Mad. 98.



1854.  
  
 WILES  
 v.  
 GRESHAM.

then under a sort of pressure from her husband. A part of the settled property was the debt of 4,000*l.* due from Mrs. *Wiles*' brothers; as to two-thirds of it, it was payable *in presenti*, the rest on the death of their mother. Now as to the first part, that was invested in the purchase of the copyhold property at *Kennington*. The trustees were admitted, and there was a declaration of trust that that copyhold property was held on the trusts of the settlement. It is said that deed was only the deed of *Wiles* and his wife. However, that is quite immaterial; the copyhold property clearly became subject to the trusts. Then *Wiles* after the purchase, it is said, advanced much more than 2,000*l.* in improving the property, so that it is now worth more than the original purchase money. We admit that; but then the Defendants say they have a right to be indemnified as against the bond debt out of the increase of value of the property created by *Wiles*. We say they have no such right: *Dimes v. Scott* (a). The accretion is the property of the *cestuis que trust*; and if that property were now sold and converted, the whole money would belong to the trust estate; the trustees have nothing to do with it.

Mr. *Glasse* for the Defendant *Gresham*.

The bond is assigned by the settlement to the other two trustees, not to *Gresham* at all. The duty, therefore, to get in the money, was confined to the two; although *Gresham* was a trustee of the bond. Further, the money was not to be got in without consent, and there never was any consent; at any rate there was no duty cast upon Mr. *Gresham* to interfere.

Now it is said that by the deed appointing new trustees in 1834, the bond was assigned to *Gresham* as well

(a) 4 Russ. 195.

as to the other trustees. But at that time it was impossible to get in the bond within the terms of the settlement, the six months having passed; and therefore the new trustees could not be guilty of breach of trust in not getting in the money, unless they were authorized by *Wiles* and his wife to do so, and they never were.

1854.  
  
*WILES*  
*v.*  
*GRESHAM.*

But if we were liable, we have a right to be re-couped out of the copyhold property. *Wiles* being liable on the bond, laid out his own money on the copyhold purchased with the trust property. That was a mode of liquidation of his liability on the bond. [He cited *Wiles v. Cooper (a).*]

Mr. *Fane* with Mr. *Glasse*.

It is incumbent on the Plaintiff to show that a direction to call in has been given. The settlement is singularly worded. Two consents are requisite; the one neutralizes the other. The object of requiring the consents is obviously the convenience of the husband. Now it is said that it is quite certain that *Wiles* the husband could have paid the debt if called upon; but the evidence shows a state of circumstances in him in which it is clear that payment would have been difficult and inconvenient; and in that state of things it was not the duty of the trustees, having regard to the consent clauses, to have required payment. There was besides, consent to leave the money outstanding. The memorandum of 1838 distinctly recognizes the existence of the debt, and authorizes it to be left outstanding on the bond.

Next, the money laid out by *Wiles* on the copyhold property, was in fact an application of the money due on

(a) 9 Beav. 294.

1854.  
  
 WILES  
 v.  
 GRESHAM.

the bond. If it was not actually when laid out, a payment, we have at least a right now to follow it, and be recouped out of it. This case does not fall within *Dimes v. Scott*. It is like the case of a voluntary settlement by the husband; and not good against us, who claim against him as creditors. It is not an accretion of the trust fund, as in *Dimes v. Scott*: the improvement in value does not arise out of the nature and condition of the trust fund, but by the additions made by *Wiles*. [He cited *Lechmere v. Earl of Carlisle* (a); *Sowden v. Sowden* (b); *Ex parte Mitford* (c); *Priddy v. Rose* (d).]

Mr. *Baily* and Mr. *Bush*, for the other Defendants, the representatives of *Cooper* and *Weston*.

The bond was cotemporaneous with the settlement. It is true it is expressed to be payable in six months, but that is mere form; it is never the intention of the parties, when a husband gives a bond on a settlement, to call it in immediately. The settlement as to consent is very ambiguous; it is impossible on those clauses to say what the trustees should do. They are entitled to the benefit of that ambiguity if they remained quiescent; they were in consequence of it, in fact, authorized to be passive.

As to the transaction in reference to the copyhold property. After payment of the money advanced by the trustees for the purchase, and making allowance for any increase in value arising out of the circumstances of the property itself, if there be any such, any extra value arising out of the payments made by *Wiles*, must clearly be set off in our favour against the money due on the bond: *Weyland v. Weyland* (a). It is contrary to all

(a) 3 P. Will. 211.

(d) 3 Mer. 86.

(b) 1 Br. C. C. 582.

(e) 2 Atk. 632.

(c) 1 Br. C. C. 398.

equity that the infants, the objects of the settlement, should have the increased value of the copyhold estate, and have the bond also paid by us, when in substance their father has really paid it.

1854.  
  
 WILES  
 v.  
 GRESHAM.

At all events, Mrs. *Wiles* cannot complain. She received all that was due to her in 1838; and in that year she executed a written consent. Whether that was retrospective or not, at any rate it bound her *in futuro*, and as against her we never could have called in the money.

The VICE-CHANCELLOR :

The question is, what was the duty imposed by the settlement on the trustees. No doubt this is a very blundering and ill-drawn settlement; but there is no suggestion impeaching its validity, or that it requires ratification. I must therefore deal with it as I find it. One peculiarity of the deed is with reference to the 2,000*l.* secured by the bond of *Wiles*, the husband, which is part of the settled property. The agreement of the parties as to that bond is recited in the deed; and it is stated to be to secure the sum of 2,000*l.* at the end of *twelve* months: then the deed recites that *Wiles* had given his bond, with a condition to pay within *six* months. Then, in the recitals, it misrecites the bond; it recites the condition to be for avoiding the bond, if *Wiles* shall pay the money within six months, *and shall in the mean time* pay interest, to be computed from the day of the marriage, *by two equal half-yearly payments, the first of such payments to be made at the expiration of six months from the day of the marriage.*

Now the bond contains no such thing; it is a simple bond for the payment of 2,000*l.* in six months, with in-

1854.  
WILES  
v.  
GRESHAM.

terest at the rate of five per cent. per annum. Then another peculiarity of this deed is this; having stated the bond, it goes on to the operative part, by which the 4,000*l.* due to Mrs. *Wiles* from her brothers is assigned to two of the three trustees; then there is the declaration of the trusts to leave outstanding or call in the debts, with consent. [His Honor referred to the clause stated in page 259.] So that, if consent was given for their not calling in these debts, it was not their duty to call them in; consent was requisite for leaving the debts outstanding; and consent was also requisite for calling them in. Now it is said that these two consents neutralize each other; and if that were so, the question would be what, if nothing were said, would be the effect? I think that then it would be the duty of the trustees to get in and receive the money, and not either by neglect or omission to leave it in the hands of the debtor. But I cannot say that I think the two clauses do necessarily neutralize each other. In construing the instrument, I must give as much effect to the first as to the second clause; and it appears to me that in the difficulty in which the trustees found themselves placed, they ought to have required the consent of the husband and wife for either course of proceeding; they ought to have had their consent for leaving the money outstanding; and, if they had got the consent of Mr. and Mrs. *Wiles* at the time, there would have been no difficulty; but it does not appear to me that they were justified in leaving it in the hands of Mr. *Wiles* without consent.

It is argued that, on the face of the instrument, looking at it altogether, the object was that the husband should hold this fund. But what is expressly stated in the deed is, that without a consent to leave the money outstanding, the husband is to pay it within six months

of the marriage; and there being no consent, the trustees were not justified in doing nothing. But it does not rest there. Subsequently, a duty became imposed on the trustees which they did not perform. First, however, I will consider how far the deed of July, 1834, appointing new trustees, can be considered a consent. [His Honor referred to the recital in that deed, that the principal of the bond debt was still due, and the interest duly paid.] Now, what was the purpose of requiring Mrs. *Wiles*' consent? Why, that she should exercise a substantial discretion; a discretion flowing from her own free and unbiassed will. But merely to substitute one trustee for another was not an exercise of any such discretion. The consent of 1838 was very different. That was a deliberate consent, and it may be operative from that period; but clearly it had no retrospective operation. When Mrs. *Wiles* was induced to join in that consent, she ought not to have been asked to do so; because it was after the happening of events which made her cease to be a free agent.

1854.  
  
*WILES*  
*v.*  
*GRESHAM.*

I must next advert to the effect of the settlement as regards Mr. *Gresham*. As to him, the settlement is again peculiar. As to the 4,000*l.*, it might have been reasonable that the calling it in should be left, with the consent of the husband and wife, in the hands of the two other trustees: but by the settlement it appears that the two trustees had the power, with the consent of the husband and wife while living, and after their deaths at their discretion, to call in not only the 4,000*l.* but the 2,000*l.* Mr. *Gresham* is not there mentioned as one of the persons directed either to call the money in or to leave it out. More, when we come to the receipt clause, there, although *Gresham* is an obligee of the bond, it is directed that the receipts of the two trustees shall be a

1854.  
  
 WILES  
 v.  
 GRESHAM.

good discharge as to the 2,000*l.*, but as to the 4,000*l.* and any other sums payable under the settlement, then the receipt of *Gresham* and the others is to be a good discharge. But in the recital of what the parties had contracted for, where it is recited that Mrs. *Wiles* was to assign the debt of 4,000*l.*, the intention of the parties as to the 2,000*l.*, is expressed to be that it should be secured to the *three* trustees "upon the trusts, &c., hereinafter expressed and declared." But whatever doubt there might be upon the construction of the settlement, if it stood alone, when we come to the instrument by which *Weston* was appointed a trustee, there the parties expressly designate all the three trustees as trustees of both sums, to hold them on the trusts of the settlement. There is, therefore, no doubt that *Gresham* was intended to be, and himself intended to be, a trustee of the 2,000*l.* Notwithstanding all the blunders in the settlement, that intention is manifested by it and by the subsequent deed, taken together. Now the trustees have certainly rendered themselves responsible by subsequent acts; not mere omissions, but acts. On the 8th August, 1836, *Wiles* became bankrupt. The three trustees proved for the debt of 2,000*l.* under the fiat: assuming, then, that up to that time the trustees were not responsible, then at least, the person in whose hands the money was, being unable to meet his engagements, the 2,000*l.* ought to have been realized. If there were assets sufficient to pay 20*s.* in the pound, they ought to have got it. Instead of that, they concur in superseding the commission, and allow *Wiles* to be free from liabilities, which, as it is represented, might have been paid. Then it appears, a composition deed was agreed upon, the effect of which was, that the bankrupt was to pay 16*s.* 6*d.* in the pound; and unless the bankruptcy was superseded within two months after the date of the deed, it was to


be inoperative. By that deed, the creditors who executed it, proposed to release *Wiles* from all liability, on receiving 16s. 6d. in the pound; it was executed by two of the trustees, *Cooper* and *Weston*, who executed it as creditors for 1,817*l.*; why for less than the 2,000*l.*, does not appear: however, they did execute for 1,817*l.* *Gresham* did not execute the deed. The bankruptcy was not superseded at the time named: however, all parties went in under the composition, and the supersedeas took place about the 9th of May, on the petition of the bankrupt, and supported by the three trustees; so that they, without any authority at that time from Mrs. *Wiles* to leave the money outstanding, concur in annulling the fiat. How, after such a state of circumstances, they could be considered not liable, I am at a loss to understand. It appears to me impossible for the trustees to say that at that time *Wiles* was under no difficulties; for not only is it clear that he was obliged to compound with his creditors, but, as I understand from the evidence, he was obliged, in order even to pay the 16s. 6d. in the pound, to borrow from other persons, and he did borrow 1,500*l.* from *Gresham* himself. *Gresham* afterwards sued him for that debt, issued execution, and distrained; and the result was his second bankruptcy. And all that time nothing whatever is done by the trustees, except that on the 14th March, 1838, they obtain a consent from Mr. and Mrs. *Wiles* for the money to remain outstanding in the hands of *Wiles*. Now I cannot say that the trustees were justified in asking for or taking that consent; Mrs. *Wiles* was no longer a free agent: her husband's difficulties rendering it of the greatest moment to him to retain the 2,000*l.* I cannot even say that even for the future that consent was satisfactory; but it is clear it was not retrospective; and the liability of the trustees existed prior to the date of that consent.

1854.


WILES  
v.

GRESHAM.



1854.  
  
 WILES  
 v.  
 GRESHAM.

Assuming, then, the liability of the trustees, the next question is, whether they have a right to be indemnified against their liability by what took place in reference to the copyhold property, out of the present increased value of that property. It appears that shortly after the marriage, in 1834, *Wiles* was desirous of purchasing certain copyhold property at *Kennington*; part of it was the house in which Mrs. *Wiles* had carried on her business before the marriage, and he was desirous that the trustees should apply part of the 4,000*l.*, the debt from Mrs. *Wiles*' brothers, in that purchase. The trustees agreed to do so, and laid out two-thirds of the 4,000*l.*; the trustees took a conveyance to themselves. Now it is clear that the *cestuis que trustent* might elect to take that property or not, as they should think fit. But then *Wiles* laid out upon it a considerable sum, exceeding, I think appears, 3,000*l.*, in improvements, by which it is worth, instead of what was originally given for it, above 5,000*l.* The *cestuis que trustent* desire that it should not be sold; but the trustees say, that whatever the property is worth now, over and above the money paid for it, ought to be treated as in satisfaction of the 2,000*l.* which *Wiles* was bound to pay. Now, when a thing is to be done, performance of the contract is one thing; satisfaction another and different question: it is not pretended that what was here done was *performance*, but it is said to be *satisfaction*. And no doubt the cases are clear to show that when a party bound to do something, has not done the precise thing, but something else has been done, intended to be in satisfaction, that will be held a satisfaction. But on the circumstances of this case, it clearly never was the intention of *Wiles*, by what he did, to satisfy his liability on the bond: his whole conduct is inconsistent with that supposition; and so is the conduct of the trustees: they never intended satisfaction. For

what took place? All the money laid out by *Wiles* was so laid out before his bankruptcy; when that takes place, the trustees prove for the 2,000*l.* as a debt unsatisfied. In 1838, they take a consent from Mrs. *Wiles* to leave the money due from *Wiles* outstanding, and yet it is to be said that the parties intended to treat the debt as satisfied. It is obvious that all that *Wiles* intended, was to lay out money on property that he considered as belonging to himself and his family, for his and their benefit; and that is not a satisfaction of his debt.

1854.  
  
*WILES*  
*v.*  
*GRESHAM.*

Then it is said that the infant plaintiffs will have sustained no loss; that if they get the 6,000*l.* settled, they will have all they have any claim to; and that they have no right to take the copyhold, worth 5,000*l.*, and to claim also the bond debt. I think it impossible to accede to this argument. When there are two separate funds, subject to trusts, and the trustees commit a breach of trust as to one, by which it is lost, I think it impossible to permit the trustees to say, "we have improved the other fund, and that fund is bound to make up the loss on the other." That I cannot hold. If the trustees have lost one part of the settled funds, they must answer for it, whatever may be the improvement of the other part. [The Vice-Chancellor then shortly discussed and disposed of the argument, founded on the assumption of the outlay by *Wiles* being in the nature of a voluntary settlement, and proceeded.] There is one other point made, viz., how far Mrs. *Wiles* can hold the trustees liable, after having given her consent. If she had been a free agent when she did so, I think she would not be entitled to claim; but she was not so; she was married; she gave her consent at a time and under circumstances when the consent ought never to have been asked by the trustees; and I do not think, in giving her consent when

1854.

WILES

v.

GRESHAM.

and as she did, she so acted as to deprive herself of her right to sue.

The decree was in substance to declare the trustees liable for the bond debt, and to direct them to pay it. Under the circumstances, and there being, in the opinion of the Court, no moral misconduct, without costs.

1854 :

22nd and 23rd

March.

*Nuisance.**Perpetual**Injunction.*

## POTTS v. LEVY.

The Plaintiff was in the enjoyment of ancient lights.

There had been a building adjoining his, with a wall alleged to have been twelve feet high, and not interfering with his light. The Defendant was about to pull down the ruins of this wall, and rebuild it thirty feet high, which he alleged was the original height. The Plaintiff's evidence as to the

original height was more precise than the Defendant's. The Defendant said he never intended to build beyond the original height. The Plaintiff proved that he threatened to build much beyond twelve feet. An injunction had been obtained, and the Defendant never moved to dissolve it.

At the hearing, a decree for a perpetual injunction was granted, without requiring the Plaintiff to try his right at law.

IN this case an injunction had been obtained on affidavits in July, 1852. No application to dissolve the injunction had been made. By a written understanding between the solicitors of the parties, dated the 14th January, 1854, it was agreed (after evidence orally had been begun) that no further evidence should be adduced on behalf of either party, but that the Plaintiff and Defendant should be at liberty, notwithstanding the 33rd General Order of 7th August, 1852, or any other order, to use as evidence on the hearing of the cause, and in all further proceedings therein, the affidavits already sworn and filed in the cause in support of and against the motion for an injunction made in the cause in which the order for an injunction, dated the 29th February, 1852, had been made, and the exhibits referred to; and that the evidence taken before Mr. Otter (one of the exami-

ners) should not be read. The cause now came on to be heard on the affidavits.

1854.

POTTS

v.

LEVY.

The Plaintiff was the occupant, as assignee under a lease made in pursuance of an agreement, dated in 1843, from *Hawkins*, who was made a Defendant, of a house and workshop in *Leman Street* in *Whitechapel*. There had been formerly adjoining these premises a theatre called the *Garrick Theatre*, which was burned down in 1846; and the bill alleged that between such building and the party-wall which divided the premises comprised in the lease from other land of *Hawkins* "there was a space of eight feet or thereabouts, which was covered over by a low slanting roof nearly level with the said wall, and at the distance of the aforesaid space of eight feet or thereabouts from the said party-wall. The said building used as a theatre was built upon a wall of about three feet higher than the said party-wall, and with a slanting roof to the height of nine feet or thereabouts; and the said building upon the said piece of land adjoining the said premises comprised in the said lease did not impede the free access of light to and the use of the buildings at the back of the premises comprised in the lease." It then alleged continued and uninterrupted use and enjoyment of the premises by the Plaintiff, without his light being impeded, till shortly before the filing of the bill. It then alleged a recent agreement by the Defendant with *Hawkins* for a lease of the ground on which the theatre had stood.

The complaint was that the Defendant had commenced rebuilding a theatre, and that instead of leaving the party-wall at its original height, he was pulling it down, and threatened to build up a theatre considerably higher than the old one, and with a new wall twenty-four feet higher

1854.

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POTTS

v.

LEVY.

from the level of the ground belonging to the Plaintiff than the old wall, and that the building of such new and high wall would darken the Plaintiff's light; and these averments were supported by affidavits.

There was some evidence to show that the Plaintiff's house had been erected more than forty years, and that the party fence wall never was *higher than about twelve feet*.

On the part of the Defendant the contention was that he never threatened or intended to build up the wall of his theatre to the height of twenty-four feet without the sanction of the Plaintiff; that he had apprised him of that before the filing of the bill; and that he had informed him before the filing of the bill that he had abandoned all idea, except with his the Plaintiff's consent, of building the wall of a greater height than that of the original wall of the theatre. The Defendant's own affidavit cautiously adhered to this statement without saying what was the original height of the wall. The affidavit of his architect was to the same effect: he said he had prepared plans for building the wall to the height of thirty-six feet, but that it was not intended so to build it without the consent of the Plaintiff, and it was understood that the wall was not to be raised to a greater height than it had originally been; but what that was he did not aver.

There was a letter from the Defendant to the Plaintiff, in which the following passage occurred, showing that at least he considered himself entitled to go much beyond twelve feet:—"I called at your factory to-day according to appointment, but the same was not kept by you. I have since ascertained that the wall which I had given

three months' notice to *Mr. Scott* of my intention to pull down and rebuild, belongs to me ; therefore I can at once begin to do so. I have also been informed that the wall was originally built prior to the fire the same height as I now require, viz. thirty feet. I shall be most happy to meet you, &c.:" and then followed offers to meet to arrange, if possible, amicably.

1854.

POTTS  
v.  
LEVY.

There was a great mass of evidence, but all tending to these propositions and not going beyond them : on the part of the Plaintiff, that the Defendant threatened to build the wall to the height of thirty-six feet, and that his plans showed it ; on the part of the Defendant, that he did not threaten or intend to build the wall higher than it had originally been, but without saying what that height was ; and that the Plaintiff was apprised of his intention before the bill was filed. The title of the Plaintiff to the land was not disputed. There was conflict of evidence as to the question of fact, whether building as the Defendant was alleged to intend to build, would really darken the Plaintiff's light. The cause now came on to be heard on the affidavits.

*Mr. Teed* and *Mr. Hallett*, for the Plaintiff.

*Mr. Glasse* and *Mr. Hetherington*, for the Defendant.

The bill was quite unnecessary and improper. We never intended to build higher than we were entitled to build, viz. to the original height of the wall, and we so informed the Plaintiff ; so that we say even an interlocutory injunction ought not on this evidence to have been granted. The bill ought on the contrary to have been dismissed with costs, as having been filed when the Plaintiff had the means of knowing it was wholly uncalled for :

1854.  
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 POTTS  
 v.  
 LEVY.

*Standish v. Mayor of Liverpool* (a); *Semple v. London and Brighton Railway Company* (b). But assuming that to have been rightly granted, what is now asked is a decree binding the legal right for ever; a perpetual injunction. That is a decree which this Court will not make in aid of the claim to ancient lights, which is a legal title, without first putting the Plaintiff to try his right at law: *Attorney-General v. Nichol* (c).

They argued also that a final decree, such as that asked, could not be made on affidavits.

Mr. Teed was not called on to reply.

THE VICE-CHANCELLOR:

I must first advert to one of the arguments advanced on behalf of the Defendant, that the Court has no jurisdiction to make a decree in this case upon the evidence taken by affidavit. Whatever might be said upon that, if there were no agreement in this case, the agreement between the parties prevents the Defendant from raising that question. The solicitors of the parties on the 14th of January, 1854, entered into the following agreement. [The Vice-Chancellor referred to the agreement.] At that time the Plaintiff was actually examining his witnesses, and then it was agreed that no further evidence should be adduced. At the time this arrangement was made, the recent act of parliament (15 & 16 Vict. cap. 86) had come into operation, and parties might agree to go into evidence on affidavits. I infer from the document before me that it had been originally arranged to go on by oral evidence; and when that had been pro-

(a) 1 Drew. 1.

(c) 16 Ves. 338.

(b) 1 Rail. Cas. 120.

ceeded in to some extent, then it was agreed that it should not be so continued, but that only affidavits should be used. There is under these circumstances no foundation for saying that I cannot now treat the affidavits as evidence at the hearing of the cause.

1854.

Portt  
v.  
Levy.

The next point made by the Defendant is, that this Court ought not to make a decree for a perpetual injunction to restrain this species of nuisance until the Plaintiff has had his right tried and established at law. Now no doubt the ordinary rule, in a case where what is about to be done will darken ancient lights, is that as the Plaintiff's right is a pure legal right, if the right is in controversy, if the title of the Plaintiff is controverted, the Court does this: It will not in general grant an interim injunction till the Plaintiff has established his title at law; but, if the circumstances of the case require it, it will grant an injunction, on the terms of the Plaintiff proceeding to a speedy trial. But, in this case, supposing I were to direct a trial, what is there to try? What would have to be tried would be, 1st, the question whether the Plaintiff has a right to protect his ancient lights; 2ndly, whether if the Defendant goes on with his building that would have the effect of darkening the Plaintiff's ancient lights. But the whole of the Defendant's case, as he puts it upon his answer, upon his affidavits, and in argument, is this, that he does not deny the Plaintiff's title, and never did deny it; that he never meant to do what it is alleged he was about to do, without the Plaintiff's permission; and that the bill was needlessly filed, because the Plaintiff's right never was denied; and then I am told that, although there is no contest about the right or about the fact of nuisance, I cannot make a decree without putting the Plaintiff to try his title at law. I think there is no ground for requiring



1854.

POTTS  
v.  
LEVY.

him to do do. [The Vice-Chancellor then went into the facts of the case, of which the result is stated in the following conclusion of his judgment.] On the evidence it is clear that the Defendant had considered that, though when the wall was pulled down it was only twelve feet high, it was originally higher, that is to say, at least as much as thirty feet high; and the affidavits go to this, that the Defendant did not mean to build the wall higher than it originally stood; but that was, in his view, thirty feet; while the Plaintiff contends that the original height did not exceed twelve feet. If this is borne in mind, all the effect of the Defendant's affidavits, showing that he never had any intention of doing what he had no right to do, vanishes. They all go to show that he did not intend to exceed thirty feet, up to which height he thought he had a right to build; but I find no ground in the evidence for asserting that the Defendant ever told the Plaintiff he did not mean to build beyond twelve feet high. On the facts I conclude that the Defendant had no intention to violate what he the Defendant thought the right of the Plaintiff, but he had an intention to violate what was in fact the Plaintiff's right.

An injunction having been granted in this case, the Defendant might have saved all further expense, if he admitted the Plaintiff's right, by submitting to the injunction, and paying all the costs up to that time; and if he had offered that, and the Plaintiff had refused it, I should not have allowed him to go on to a hearing of the cause at the Defendant's expense. But the Defendant has made no such offer; and the Plaintiff had a right to say that the Defendant, not submitting to the injunction, has not admitted his right.

I think, therefore, the Plaintiff had a right to bring

the cause to a hearing; that on the facts the Defendant did intend to violate the Plaintiff's actual right, though he did not intend to violate what he thought the Plaintiff's right; and that, under the circumstances of this case, the Plaintiff has a right to a decree without being sent to law. Decree, perpetual injunction, with costs.

1854.

POTTS  
v.  
LEVY.

1854:  
23rd March.

Pleading.  
Plea.

Title to redeem.

WINTERBOTTOM v. TAYLOE.

THE Plaintiff was the proprietor of shares in the *Porkellis* mining company; he deposited them with the Defendant *Tayloe* as a security, and transferred them into the Defendant's name, so as to give him the legal title. Afterwards, having paid off the debt, he claimed to have them back; but the Defendant claimed to be entitled to retain them, in respect of an unsettled account; and the bill was to redeem the shares.

Bill for redemption by mortgagee of shares in a company transferred into the name of the mortgagor. Plea, that at the time of the bill filed, all the shares were by assignment vested in another person: Held, the Plaintiff had a title to sue, and the plea overruled.

To this a plea was put in of a deed by which the Plaintiff had, before the filing of the bill, assigned all his shares in the *Porkellis* and other mining companies, and all his shares and interest in the said mines, using general words, to one *Birch*; and the plea alleged that, at the time the bill was filed, the shares mentioned in the bill were vested in *Birch*. The language of the deed made it, however, slightly doubtful whether it would include the shares standing in the name of *Tayloe*.

Mr. *W. W. Cooper*, for the Defendant, stated the case made by the bill and the plea.

All the interest of the Plaintiff in the mines, which was only an equity of redemption, is vested, and was vested at the time the bill was filed, in *Birch*.

1854.  
WINTERBOTTOM  
v.  
TAYLOR.

The plea is like a plea of bankruptcy. It is not necessary to allege that the assignee claims; it is sufficient to show the assignment and prove it: *Makepeace v. Haythorn* (a).

Mr. *Fischer*, for the bill, was not called upon.

The VICE-CHANCELLOR:

I abstain from expressing any opinion upon the operation of the deed as between the Plaintiff and *Birch*. It may be that *Birch* has a right to insist that the effect is to assign to him not only all the shares, &c., which have been actually transferred to him, but all shares of every kind whatsoever that *Winterbottom* had: on that I express no opinion. The only question which I have to determine is, whether, on the construction of the assignment, I can say that *Winterbottom* has no right at all to redeem. Suppose the Defendant's view to be correct, that *Winterbottom* granted over all his interest to *Birch*; is it not nevertheless the duty of *Winterbottom* to redeem the shares and hand them over to *Birch*? If this were the hearing of the cause, the Defendant might insist that there was a want of parties; that the suit could not proceed in the absence of *Birch*. But this is a plea in bar of all interest, and without saying anything about the construction of the deed, I am of opinion that there is no ground for saying that the Plaintiff cannot sue at all, and the plea must be overruled.

(a) 4 Russ. 244.

1854 :  
24th April.  
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*Practice.*  
*Costs.*  
*Order of*  
*Payment of*  
*Costs.*

MAJOR *v.* MAJOR.

**T**HIS case coming on on further directions, a question arose whether certain costs incurred in a litigation in the Ecclesiastical Court for determining which of certain testamentary instruments should be admitted to probate, and which costs had been by the decree of the Ecclesiastical Court decreed to be paid out of the estate, should be paid in priority to or after the costs of administration in this Court. The litigation in the Ecclesiastical Court arose on the will of *Mary Robinson* ; an instrument of a subsequent date had been propounded as a codicil to her will, but was refused admission to probate. Certain costs, amounting to 625*l.* had been incurred in support of this alleged codicil by *Peter Knight* and *Thomas Knight*, and the Ecclesiastical Court ordered those costs to be paid out of the testatrix's estate.

Costs of litigation in the Ecclesiastical Court for determining which is the testator's will, although ordered by the Ecclesiastical Court to be paid out of the estate, are postponed to the costs of administration in this Court.

Mr. *Willcock* and Mr. *Greene*, for the Plaintiff, the representative of the estate.

The Messrs. *Knight* are not the legal representatives of *Mary Robinson*. They could not, if the assets had actually come to their hands, have legally retained their costs ; the costs of the administration must be first paid. The rule is, that the costs necessarily incurred in realizing the fund take priority. It would be quite unreasonable to pay first the costs incurred by them in a litigation, the object of which on their part was to upset the very will on which this suit is founded.

Mr. *J. H. Palmer* and *W. H. Clarke*, for other parties in the same interest.

1854.

MAJOR

v.

MAJOR.

Mr. Selwyn, for the *Knight's*.

I quite admit the general rule as stated on the other side, that when costs are necessarily incurred in realizing assets, they should be first paid. Now here there was a will and a codicil. Whether both of those were to be admitted, or which was to be admitted, had to be decided by the Ecclesiastical Court. The *Knight's* were necessary parties to the suit to determine which was to be admitted, this will or the codicil. It was necessary before the parties could come here at all to administer the estate, to ascertain which was the instrument, the trusts of which were to be declared and administered. It is admitted that the costs of the *Knight's* were properly incurred. And as they were incurred in a proceeding without which it would have been impossible to proceed to realize the assets at all, they ought to be first paid; they are in fact costs of administration.

The VICE-CHANCELLOR :

The Ecclesiastical Court had to decide the question of probate, and having decided, it came to the conclusion that the *Knight's* were entitled to have their costs out of the estate. If that Court had had power to administer the estate, it might have ordered payment of those costs; but having no such jurisdiction, all it could do was to create by its decree a charge on the estate. Then, in order to realize the assets, it was necessary to come to this Court; and as against creditors and other charges of all kinds upon the estate, it is the clear and settled rule, that the costs incurred in this Court in the administration, must be paid first. It is so in a creditors' suit; if there is only enough to pay the costs, the creditors must go without: and so here; the claim of the *Knight's* stands only in the form of a charge created by the decree of the Ecclesiastical Court on the assets, when realized;

but only after first bearing the costs of realizing the assets. I am of opinion therefore that the costs of this suit must be paid in priority to the costs of the litigation in the Ecclesiastical Court.

1854.

MAJOR

v.

MAJOR.

*Re* BINGLEY FREE SCHOOL.

BY a private act passed on the 15th August, in the 16 & 17 Vict. (1853), trustees of this charity were appointed, and regulations made, for the management of the trusts.

By the 5th section of the act power was given to the trustees, *with the approbation of the Court of Chancery*, to sell or exchange the charity estates.

The 22nd section was as follows:—"Whenever an appointment of new trustees shall, under the preceding provision, become necessary, and in all other cases in which the said trustees are by this act authorized to do any act with the approbation or under the direction of the Court of Chancery, or in which the approbation or direction of the said Court shall be necessary for the regulation and management of the said charities and their estates and property, the said trustees shall be at liberty, without special order, to lay proposals for such purpose before one of the judges of the said Court in chambers; and such judge shall be at liberty to receive the same and to make such order thereon as shall be just; and the Attorney-general shall have notice of all such proceedings: provided always, that nothing herein contained shall be construed to destroy, lessen or affect the power

1854.  
29th April.

*Statutes.  
Charitable  
Trusts Act.*

A private charity act, passed shortly before the Charitable Trusts Act, 1853, gave power to the trustees in any matter in which they were to act, with the approbation of the Court of Chancery, to lay proposals at once before the judge in Chambers.

Held, that this was not repealed by the 17th sect. of the Charitable Trusts Act; but the necessity of a preliminary application to the Chancery Commissioners was added.

1854.

*Re* BINGLEY  
FREE SCHOOL.

of the said Court to make orders touching the said charities and their estate and property, and the regulations and management thereof, in or upon an information or petition presented under the powers of the act passed in the 52nd year of the reign of his late majesty king George the third, intituled 'An Act to provide a summary Remedy in Cases of Abuse of Trusts created for Charitable Purposes.'"

By the 17th section of the Charitable Trusts Act, 1853, it is enacted:—"Before any suit, petition or other proceeding (not being an application in any suit or measure actually pending) for obtaining any relief, order or direction concerning or relating to any charity, or the estate, funds, property or income thereof, shall be commenced, presented or taken by any person whomsoever, there shall be transmitted by such person to the said board notice in writing of such proposed suit, petition or proceeding, and such statement, information and particulars as may be requisite or proper, or may be required from time to time by the said Board for explaining the nature and objects thereof; and the said board, if upon consideration of the circumstances they so think fit, may, by an order or certificate signed by their secretary, authorize or direct any suit, petition or other proceeding to be commenced, presented or taken with respect to such charity, either for the objects and in the manner specified or mentioned in such notice, or for such other objects, and in such manner and form, and subject to such stipulations or provisions for securing the charity against liability to any costs or expenses, and to such other stipulations or provisions for the protection or benefit of the charity as the said board may think proper; and such board, if it seem proper to them, may by such order or certificate as aforesaid require and direct that any proceeding so authorized by

them in respect of any charity shall be delayed during such period as shall seem proper to and be directed by such board; and every such order or certificate may be in such form and may contain such statements and particulars as such board shall think fit; and (save as herein otherwise provided) no suit, petition or other proceeding for obtaining any such relief, order or direction as last aforesaid, shall be entertained or proceeded with by the Court of Chancery, or by any Court or judge, except upon or in conformity with an order or certificate of the said board: provided always, that this enactment shall not extend to or affect any such petition or proceeding in which any person shall claim any property or seek any relief adversely to any charity."

1854.  
  
*Re* BINGLEY  
 FREE SCHOOL.

The trustees of the charity carried in before the judge at chambers a proposal for selling some of the charity estates, and the question was whether they must not in the first instance apply to the chancery commissioners.

Mr. *Amphlett*, for the trustees, submitted that the Charitable Trusts Act did not intend to override the provisions of the private act under the 22nd section, and to impose on charities acting under such act, the double expense of going first before the commissioners, and then before the Court.

Mr. *Wickens*, for the crown, left the point for the Court.

The VICE-CHANCELLOR held that the general act applied: it did not repeal the private act at all; it did not take away the necessity of obtaining the approbation of the Court of Chancery, but it added the necessity of first going to the charity commissioners. He thought the application must be in the first instance to them.



1854:  
29th April.

Administration.  
*Irish*  
Judgment.

COOK v. GREGSON.

Where a person deceased died domiciled in *Ireland*, leaving property in *Ireland* and *England*, and the same executors in both countries:  
Held, that an *Irish* judgment had priority over *English* simple contract creditors, against *Irish* property remitted to *England* by the executors and being there administered.

**THIS** case came on upon a summons adjourned from chambers in a creditor's suit for administering the estate of the testator in *England*. The testator was domiciled in *Ireland*; he had property there and in *England*. The same persons were executors of his will, both in *England* and *Ireland*. They proved in both countries, and brought a considerable part of the property from *Ireland*. The question was, whether a creditor claiming under an *Irish* judgment could take priority in the suit, as against the property brought from *Ireland*, over simple contract creditors here.

Mr. Cotton, for the Plaintiff.

This point was decided in *Harris v. Saunders* (a). An *Irish* judgment is a foreign judgment, and constitutes a mere simple contract debt. He also cited *Preston v. Lord Melville* (b).

Mr. Toller, for another creditor.

The fund comes into Court because an *English* creditor files a bill, and then the executors bring the whole estate into Court. The *Irish* creditor might have prevented the *Irish* fund being brought here, and if he did not, it was his own fault. But being here, it must be administered according to the *English* law.

(a) 4 Barn. & Cres. 411.

(b) 8 Cl. & Fin. 1.

Mr. *Giffard*, for the *Irish* judgment creditor.

*Preston v. Lord Melville* is in my favour. The testator dying domiciled in *Ireland*, the personal property and the course of administration follow the domicile. The assets were collected in *Ireland* by force of a will proved in *Ireland*. We only ask to touch the *Irish* assets.

1854.  
Cook  
v.  
GREGSON.

In administering the *Irish* property in this country it will be administered as if it had remained and been administered in *Ireland*: *Earl of Winchelsea v. Garetty* (a); *Thompson v. The Advocate-General* (b).

Mr. *Cotton*, in reply.

I cited the case in *Barn. & Cress.* only to show that the *Irish* judgment is merely a foreign judgment, therefore that parties claiming under it cannot be treated as judgment creditors here. As to the rule that property follows the domicile, that is true as to the construction of wills and the like, but not as to the administration of estates.

The VICE-CHANCELLOR.

Suppose the testator had been domiciled in *England*, had died in this country, and had left assets in this country and in *Ireland*; a small amount in *Ireland* and a large amount here; owing debts in *England* and also in *Ireland*, and suppose an *English* creditor had obtained a judgment, would there have been any right in the *English* executors getting in the *English* assets, to send over the funds to *Ireland* in order that one of the *Irish* creditors

(a) 2 Keen, 293.

(b) 12 Cl. & Fin. 1.

1854.  
Cook  
v.  
GREGSON.

might get a priority? Is it to depend upon the caprice of the executors, by sending the assets to another country, what are to be the rights of creditors? If the executors in the two countries were different persons, and there were *Irish* creditors, could the *Irish* executors be justified in sending the assets to this country before the *Irish* creditors were satisfied? It so happens that in this case the same persons are executors in both countries, but the case must be decided on the same ground as if they were different. Now, if they were different persons, it is clear that the duty of each would be this: he must take care first to pay the debts owing in the country in which he is executor, and then, and not till then, if there is a surplus, he may send it to the other country. The duty of the *Irish* executor was to pay the *Irish* debts first, according to their order in priority. What has been done is this: the *Irish* executors have remitted to *England* part of the *Irish* assets without first paying the *Irish* creditors, and the *English* executors are now proceeding to administer assets partly *English* partly *Irish*. The question is whether the assets remitted here ought not to be administered as if they had remained and were being administered in *Ireland*. I think they ought to be so administered, and according to their priorities in *Ireland*; and, therefore, the *Irish* judgment creditor must be paid, as against the *Irish* assets, in priority to the *English* simple contract creditors.

1854:  
2nd May.

*Equitable  
Mortgage.  
Merger.*

VAUGHAN v. VANDERSTEGEN.

**I**N this cause a petition was presented by *G. Annesley*, a solicitor, to have certain costs paid out of the produce of a policy of insurance on the life of Lady *Dunboyne*. Lady *Dunboyne* had employed Mr. *Annesley* as her solicitor. In November, 1843, Lady *Dunboyne* deposited the policy on her life with *Annesley*, without any memorandum. The Master's report found there was a debt and its amount. The question was, whether the security could be enforced.

On the 31st of December, 1844, a premium on the policy being due, which Lady *Dunboyne* could not pay, *Annesley* paid it, and a memorandum was then signed by Lady *Dunboyne*, which was as follows:—"Whereas there is a premium now due, amounting to 28*l.* 14*s.* 9*d.*, on the policy [describing it]: now I do hereby, in consideration of *G. Annesley* agreeing to pay the said premium, agree to assign the said policy of assurance not only as security for the said sum, but also for all sums of money he may hereafter advance and pay on my account.—Dated this 31st December, 1844.—*M. A. Dunboyne*."

This agreement, it was contended, was quite irrespective of the deposit of the policy, and had reference only to cash advances. The agreement was carried into effect by a mortgage of the policy on the 12th June, 1845. The mortgage did not notice the costs, or the deposit on account of them, and purported only to be a security for

A solicitor took a deposit of a policy from his client, under a parol agreement that it was to secure his then existing costs. Afterwards he made advances and took an assignment of the policy to secure them; the deed saying nothing about the costs: Held, that the deed expressing no agreement that it was to include the costs, the possession under it merged the possession under the deposit, and the policy was only a security for the advances.

1854.  
VAUGHAN  
v.  
VANDER-  
STEGEN.

sums already advanced in loans, payments, &c., on her behalf, amounting to 175*l.* 6*s.*, and such further sums as *Annesley* should advance, not exceeding 500*l.* The policy remained in *Annesley's* hands till Lady *Dunboyne's* death.

Mr. *Dickinson*, for the petitioner, argued the question at first on the ground that, until the formal mortgage was made, the solicitor had the ordinary lien upon the client's documents in his possession; and that, when afterwards a mortgage was made for a different purpose and to secure different sums, that was no release or waiver of the solicitor's right in respect of the previous lien: there was no change of possession and no merger, such as that of an equitable title in a legal title, the mortgage of the policy not being in fact a legal assurance, since the policy was a chose in action not capable of being legally assigned.


Mr. *Greene*, for the Plaintiff in the suit, opposed the petition.

He said there was no memorandum, and no evidence of the intention of the parties on the deposit of the policy. The inference from the memorandum of December was, that the previous deposit had been made for the purposes contained in that memorandum; at least, the evidence did not show that such was not the object of the deposit; and the general lien of a solicitor would not attach, if there was any other specific object of the deposit. He referred to *Cowell v. Simpson* (a), to show that a specific security for costs merges the common lien.

Mr. *Faber*, for other parties in the same interest, argued that the policy was effected by Lady *Dunboyne*

(a) 16 Ves. 275.

before her marriage with Lord *Dunboyne*, and that it was part of her personal estate at the date of the settlement executed on her marriage, and was included in it as such (a); that she could not dispose of it, except by appointment; and she had never appointed it to *Annesley*.

1854.  
  
 VAUGHAN  
 v.  
 VANDER-  
 STEGEN.

The VICE-CHANCELLOR intimated that he did not accede to this argument.

Mr. *Dickinson* was about to reply, but the Court thought there ought to be further evidence of the purpose with which the deposit was made.

On the 9th of May the case came on again on a further affidavit by Mr. *Annesley*, by which it appeared that he had, in and previously to November, 1844, applied to Lady *Dunboyne* to pay his then bill of costs; that she said she was then unable to do so, but was willing to give him security, and *promised* to place in his hands the policy, the only available security that she had. He produced a letter, dated the 18th November, in which he acknowledged the receipt of the policy. It appeared, by the same affidavit, that early in November Lady *Dunboyne* applied to *Annesley* to lend her 30*l.* for payment of some taxes, and he produced his reply, which was as follows:—"Although very inconvenient, I send you a cheque for 30*l.*, as requested, and request you will send me the policy of insurance as a security."

Mr. *Dickinson* now argued that, taking the deposit to have been for the express purpose of securing the costs and the 30*l.*, the mortgage of 1845 was a clearly distinct transaction; and the evidence displaced the notion of the

(a) See ante, p. 166, the terms of the settlement.

1854.  
  
 VAUGHAN  
 v.  
 VANDER-  
 STEGEN.

deposit being in reference to the subsequent cash advances.

On the argument that the formal security operated as a waiver or merger of the prior security, he argued that the case cited from the 16 Ves., *Cowell v. Simpson*, had no application. That applied only to the case of the common solicitors' lien. This was not a question of solicitors' lien, but of a mortgagee having a specific lien—by the formal deed. *Annesley* did not express any intention to abandon his previous claim. The mortgage was not properly a legal mortgage, and did not operate as a merger of the previous security; they were both merely equitable, and consistent with each other.

*Judgment.*

The VICE-CHANCELLOR, after expressing his entire approbation of the conduct of the petitioner throughout the transaction, continued as follows:—The circumstances of this case are simple. In November, 1844, Mr. *Annesley*, finding that Lady *Dunboyne* owed him considerable costs, became desirous of having a security for them. At the same time, Lady *Dunboyne* applied to him to advance her 30*l.*, and the policy was then deposited by Lady *Dunboyne* with *Annesley*, by way of securing the costs and the 30*l.*

A few weeks after, another occasion arose for an advance of money by *Annesley*, viz., for paying a premium on the policy, and then he required some better security than a mere deposit, and the mortgage was agreed upon; and though the conversion of the security into a mortgage did not give to *Annesley* a legal estate, still it was a more formal and satisfactory transaction. Now, here I may observe that, although the memorandum made in December did not indicate an intention to give security

for past advances, yet when the mortgage itself came to be made in June, it was competent to the parties so to have made it. Why was it not then made a security for past costs, if that was the intention? Whether it was that Mr. *Annesley* did not think it necessary, or whether the omission arose from inadvertence, does not appear; but I think it would be contrary to principle to say that, where there is a deposit for a certain purpose, to secure a certain amount then due, and then the depositor gives a formal mortgage, expressing for what it is given, that being the agreement between the parties, expressing all that they intend should be secured, the mortgagor can have a right to assume that the former security subsists, if it is not said in the deed that that was the intention. When a mortgage is given to go as near as possible to the conveyance of a legal estate, you must look to that deed alone to see what security was intended, that is, to what contract the property was intended to be subject. It may have been intended at the time that, notwithstanding the transaction, the policy was to remain a security for what is not mentioned in the deed, the costs; but in the absence of any such expressed agreement, I must apply the general principle to this case. The policy is, I think, in the hands of Mr. *Annesley*, not by virtue of the deposit, but of the mortgage, and when that is satisfied he has no further right to hold it. The possession by the deposit is merged in the possession under the mortgage. Mr. *Annesley* can only have out of the produce of the policy what is secured by the mortgage.

The petition was dismissed; but under all the circumstances, and having regard to the course pursued by the petitioner, who had in every way facilitated the trial of the question at the least expense to the estate, his costs were allowed out of the policy money.

1854.

VAUGHAN  
v.  
VANDER-  
STEGEN.



1854:  
9th May.

Will.

Construction.  
Survivorship.  
Remoteness.


HODSON v. MICKLETHWAITE.

Testator gave a portion of his personal estate to the seven children of his son and his wife, naming them, "together with every other child hereafter to be born of the said (wife) during the life of the said (husband), or within nine months after his decease, in equal shares, with benefit of survivorship." He then directed their maintenance with the dividends until the youngest should attain thirty; then upon trust for them respectively and the survivors and survivor of them in equal shares, with power to the trustees to make such distribution sooner, if they think fit, provided the youngest child should have attained twenty-one.

Held, that the period of division was the death of the husband, or the short period limited after his death; that the clause of maintenance till thirty, and postponing payment till then, did not disturb the previous vesting in the children surviving at the death of the husband, so as to introduce remoteness, and that, consequently, one child having died living the father, her share went over to those who should be surviving at his death.

**WILLIAM HODSON** made his will directing the sale of his estates, and after appropriating five-sixths of the produce, he thus continued:—"And as to the remaining, one-sixth part thereof shall remain and be in trust for each of the seven children of *Mary Hodson*, otherwise *Mary Edmonds*, the wife or reputed wife of my son *Henry Hodson*, by the several names or descriptions of *Elizu Hodson*, otherwise *Edmonds*, *Charlotte Hodson*, otherwise *Edmonds*, *Henry Hodson*, otherwise *Edmonds*, *William Hodson*, otherwise *Edmonds*, *Frances Henrietta Hodson*, otherwise *Edmonds*, *Thomas Hodson*, otherwise *Edmonds*, and *Edward Hodson*, otherwise *Edmonds*, or by whatsoever other name or names they or any of them may be called, known or described, together with every other child hereafter to be born of the said *Mary Hodson*, otherwise *Edmonds*, during the life of the said *William Henry Hodson* or within nine months after his decease, in equal shares absolutely, and with benefit of survivorship: and that they the said trustees or trustee do and shall pay and apply all or such part of the

interest, dividends and annual proceeds of the said remaining one-sixth part of the said trust monies and estate as to them the said trustees or trustee shall seem reasonable and proper for or towards the maintenance, education, advancement and support of any one or more of them the said children of the said *Mary Hodson*, otherwise *Edmonds*, until the youngest of such children for the time being shall attain the age of thirty years; then upon trust for them the said several children respectively, and the survivors and survivor of them, in equal shares absolutely. But I hereby nevertheless authorize and empower my said trustees for the time being, should they in their discretion think proper, to make such distribution sooner, provided such youngest child shall have attained the age of twenty-one, but not otherwise."

1854.  
  
 HODSON  
 v.  
 MICKLE-  
 THWAITE.

*W. H. Hodson* and *Mary Edmonds* were in fact married in 1820, and were both living at the date of the institution of the suit. The testator died in 1838, leaving him surviving the seven children of *W. H. Hodson* and *Mary* his wife; but one of them died in 1852, and the Plaintiff was his widow and representative.

Mr. *Batten*, for the Plaintiff, argued that the words in the gift "together with every child hereafter to be born," could only have two meanings. They must mean to confine the gift to children born living the testator, or to extend it to children born after the testator. The latter was the true construction, otherwise the clause of survivorship in the latter part of the will could have no meaning, as that applied to the survivors or survivor when the youngest should attain thirty, which might never take place during the testator's life. But then if that was the true construction, the clause of survivorship was void for remoteness, as the vesting might be suspended

1854.  
  
 HODSON  
 v.  
 MICKLE-  
 THWAITE.

beyond the lawful period. The effect was that the shares vested in all born during the life of *W. H. Hodson*, and the Plaintiff was entitled to a share. He cited *Gilbert v. Boorman* (a), *Hughes v. Hughes* (b), *Cripps v. Woolcot* (c).

Mr. *Rogers* appeared for the six children who were surviving and for the trustees.

*Judgment.*

The VICE-CHANCELLOR, after referring to the language of the will down to the words "in equal shares absolutely with benefit of survivorship," proceeded thus:—If that gift stood alone it is apparent that the testator was not sure whether his son *William Henry* was or not married. He knew there were children, but not whether *Mary Edmonds* was his son's wife or not. He meant to provide not only for the seven children, but for any children who might be born of his son and *Mary Edmonds* during the life of his son; and such a provision for future illegitimate children would of course not be valid. In fact however *W. H. Hodson* and *Mary Edmonds* were married in 1820, so that the provision for future children would be valid; and under this gift any children born of *Mary Hodson* by her husband would be entitled to take shares, and there would be nothing of remoteness, because all the interests must vest during a life in being. Then the testator goes on to say "with benefit of survivorship." Now what does he mean by that? Why, that no child should take absolutely till the death of his son *W. H. Hodson*, or his wife; that until that period there never could be any division. He means that if any child died before that period, his or her share should go over to the others. The clause of survivorship can only refer to one of two periods, either the death of the testator, or the death of the son. It could not refer to the death of the testator, because he speaks of all the children who shall

(a) 11 Ves. 238. (b) 14 Ves. 256. (c) 4 Mad. 11.

be born of *Mary Edmonds* during the life of *W. H. Hodson*; and as the benefit of survivorship was thus intended to take effect on the death of his son *William Henry*, he could not have intended to limit it to the period of his own death. Thus far there is no doubt; no shares were fixed till the period of the death of the husband or the wife. The period of payment is afterwards postponed, but that does not alter the vesting; the periods of payment and of division may be the same, but they are not necessarily so. There may be a period of division as to vesting, and a different period of payment, which will not necessarily prevent the vesting. [The Vice-Chancellor then referred to the latter part of the clause set out in p 295, and continued in reference to the clause of survivorship.] That of course applies to any children living at the death of the husband or wife, or within the short period limited over. A child might be born a day before the death of *William Henry* or within the nine months named, and any such child was to take. But all, whenever born, were to be maintained until the youngest attained the age of thirty, and then only the payment was to be made. This would be inoperative when each child attained twenty-one, unless the period of survivorship was meant to apply to the death of the husband or wife. It is said that the previous language of the gift must be construed by this; but, on the contrary, I think I must construe the survivorship clause in this part of the will by the substantive gift in the earlier part. The gift is suspended only until there shall be no possibility of more children; at that period then the survivor is to be entitled. The effect is, therefore, that as to the share of the child who has died leaving *W. H. Hodson* surviving, such of the children as shall be living at his death will be entitled to it.

1854.

  
 HODSON  
 v.  
 MICKLE-  
 THWAITE.

1854.

HODSON

v.

MICKLE-  
THWAITE.

The declaration was that the fund was distributable among the six children and such other children as might come into esse during the life of *W. H. Hodson*, or within nine months after, and should be living at the death of *W. H. Hodson*, or within the nine months, subject to the right of survivorship, if any should die within that period.

1854:

2nd and 9th

May.

Deed.

Construction.

Covenant  
to settle.

## RAMSDEN v. SMITH.

A marriage settlement contained a clause, by which it was agreed, and the husband covenanted, that if any real or personal estate should descend or devolve to, or vest in the wife or in any person in trust for her, the husband should make, do and execute, or cause or procure to be made, done or executed, or join or concur with the wife in making, doing or executing all such acts, deeds, &c., as should be necessary for settling such property on the trusts of the settlement.

IN this case the bill stated a settlement made on the marriage of Mr. and Mrs. *Ramsden*, by which 2,000*l.*, the wife's property, was settled in the usual manner; and then followed this clause:—

“ And it is hereby further agreed and declared, and the said *Frank Ramsden* for himself, his heirs, executors and administrators, doth hereby covenant, promise and agree with and to the said *William Smith*, *George Ramsden* and *Sir William Bryan Cooke*, and the survivors and survivor of them, his executors, administrators and assigns, that if any real or personal estate whatsoever, amounting in each case to the value of 100*l.* or upwards, shall at any time or times during the said intended coverture descend or devolve to or vest in the said *Elizabeth Smith* or in any person or persons in trust for her, or to or in the said *Frank Ramsden* in her right, then and in that case, and so often as the same shall happen, he the said *Frank Ramsden* shall and will make, do and execute, or cause or procure to be made, done and exe-

A legacy was left to the wife for her separate use.

Held, that it did not come within the agreement and covenant to settle, contained in the settlement.

cuted, or join or concur with the said *Elizabeth Smith*, his intended wife, her heirs, executors or administrators, in the making, doing and executing of all such acts, deeds, conveyances, assignments and assurances in the law whatsoever as shall be necessary and proper for conveying, assigning, assuring and confirming all such real and personal estate, in such manner as that, regard being had to the nature and quality of the same, the said real and personal estate shall and may be vested in the said *William Smith*, *George Ramsden* and *Sir William Bryan Cooke*, or the survivors or survivor of them, his heirs, executors, administrators and assigns; upon such trusts, intents and purposes, and under and subject to such powers, provisoes, agreements and declarations as will correspond, or best and nearest correspond, with the trusts, intents and purposes, powers, provisoes, agreements and declarations hereinbefore expressed, declared and contained of and concerning the said sum of 2,000*l.*, and the interest thereof, hereinbefore covenanted to be paid by the said *Samuel Smith*, or such of them as may be then subsisting, undetermined and capable of taking effect."

1854.  
  
 RAMSDEN  
 v.  
 SMITH.

Mrs. *Nares*, the aunt of Mrs. *Ramsden*, by her will gave certain personal property to her nephews and nieces; and as to her nieces, she directed that "the shares of such of her said nieces as should be married at the time of her death should be for their sole use and benefit, independent of their respective husbands, and their respective receipts should be a good discharge for the same."

The bill was by Mrs. *Ramsden*, one of these nieces, and it prayed that the property bequeathed to her by Mrs. *Nares* might be declared not to be subject to the

1854.  
  
 RAMSDEN  
 v.  
 SMITH.

trusts of her marriage settlement, and that the executors of Mrs. *Nares*' will might be directed to transfer or pay the same to her or to such person as she should name for her sole and separate use.

The trustees of the settlement, on behalf of an infant child of the marriage, not a party, opposed this, and contended that the covenant to settle included the bequest from Mrs. *Nares*.

Mr. *Baily* and Mr. *Grenside*, for the Plaintiff Mrs. *Ramsden*.

They referred to *Douglas v. Congreve* (a), *Thornton v. Bright* (b). On the other side will be cited *Butcher v. Butcher* (c). In that case the covenant was that "all proper parties" should assign. In this case the covenant is that the husband shall do the acts; therefore it cannot apply to property over which he could have no control.

If this legacy were to be settled, instead of Mrs. *Ramsden* enjoying it for her separate use, she might never have any enjoyment of it; for the settlement gives the first life estate to the husband; so that if Mrs. *Ramsden* died before her husband, Mrs. *Nares*' intention would be entirely set aside.

On the authorities, the covenant of the husband can only bind the property over which he might have dominion. The rule therefore is clear. There is no appearance in this deed of any intention on the part of the wife to settle; there is only the covenant of the husband.

(a) 1 Keen, 410.

(b) 2 Myl. & Cr. 254.

(c) 14 Beav. 222.

There are no such words as between "all the parties," as in *Butcher v. Butcher*; it is, therefore, no more than the husband's covenant.

1854.  
  
 RAMSDEN  
 v.  
 SMITH.

Mr. *G. L. Russell*, for the trustees of the settlement, representing the infant child.

This legacy is bound by the trusts of settlement; settling it will not disturb Mrs. *Nares*' will, which gives Mrs. *Ramsden* absolute dominion to settle it or not. The Plaintiff was of age when the settlement was made; it was not made to provide for the husband alone, but for the children. Then, if you look at the deed, you find what is reasonable,—that as the children take large interests from the father, 10,400*l.*, whereas they take only 2,000*l.* from the wife, it would be natural that they should be intended to take all that the wife might have after the marriage.

Then as to the terms of the deed: it begins by declarations between the "parties to these presents." Then immediately preceding the covenant in question, is a declaration "between *all* the parties to these presents." What then is the agreement? Why, to settle any property that may vest in the wife or in any person as a *trustee* for her; that is the very case occurring.

Mr. *Fleming*, for other parties in the same interest.

On the whole scope of the agreement the contract was, that *any* property of the lady should be settled; that is the meaning of the settlement. It is the agreement of *all the parties* to settle *any* property; how can that be said not to include this property? *Butcher v. Butcher* is the same case as this. That was determined on the ground of its being the agreement of *all the parties*, and that is the contract here.



1854.

RAMSDEN

v.  
SMITH.Mr. *Baily*, in reply.

On the 9th of May the VICE-CHANCELLOR delivered the following judgment:—

The question in this case is, whether certain property which has devolved upon a married lady for her separate use, comes within the operation of a covenant contained in her marriage settlement, which was a covenant to settle her after acquired property? The clause in the marriage settlement upon which the question turns is in these terms—[the Vice-Chancellor referred to the clause set out in p. 298]; and the deed goes on to provide that such property shall be subject to the trusts of the settlement. That settlement was dated in August, 1835. Many years after the marriage, Mrs. *Elizabeth Nares*, by her will dated 21st July, 1851, gave a certain portion of her property to her three nephews and six nieces, one of which nieces was Mrs. *Ramsden*, whose settlement I have just referred to; and the testatrix directs that the shares of such of her said nieces as should be married at the time of her death should be for their sole use and benefit, independent of their respective husbands, and their respective receipts should be a good discharge for the same.


The question is—whether that share of the property which by the will of Mrs. *Nares* was given to Mrs. *Ramsden* for her separate use, comes within the operation of the covenant that I have read in the marriage settlement?

Now it is clear that the question is simply a question of intention, which intention is to be collected from the terms of the marriage settlement. There is no doubt whatever that the property which was given by the will of Mrs. *Nares* to Mrs. *Ramsden* for her separate use

comes clearly within the description of real or personal estate which has descended or devolved to or become vested in Mrs. *Ramsden*. The question is, whether, upon the construction of this clause in the settlement, the intention of the parties was to settle such property?

1854.  
  
 RAMSDEN  
 v.  
 SMITH.

Now several cases have been cited upon the subject. The first of these cases is *Douglas v. Congreve*, in the 1st vol. of *Keen* (a). In that case the husband contracted (it was simply a covenant by the husband with the trustees of the settlement), that if at any time or times during the coverture "any real or personal estate should descend or devolve to or vest in the Plaintiff (that is in the intended wife), or in *Douglas* the then intended husband in her right, which should exceed the sum of 200*l.*, then he, *Douglas*, should execute, or cause to be executed, or join or concur with the wife, her heirs, executors or administrators, in executing all such acts as should be necessary and proper for conveying, assuring and confirming" that property according to the trusts of the settlement. The terms of the covenant are almost identical with the terms here. There is this difference however between the two cases,—that besides the language which imports an express covenant by the husband, the clause here commences with the words "it is hereby agreed and declared." I will consider the effect of these words presently. But in the case of *Douglas v. Congreve*, the late Master of the Rolls, Lord *Langdale*, decided that the covenant did not apply to the property which came to the wife for her separate use subsequently to the marriage. His lordship says :—"The covenant, as it appears to me, could only relate to property which in right of the wife became subject to the control of the husband, and not to property which by the will of the giver was to be-

1854.  
  
 RAMSDEN  
 v.  
 SMITH.

long to her independently of him." Now there were two grounds upon which it was properly, as I conceive, held that the covenant did not apply. One was that it was merely the covenant of the husband; and besides that, it was a covenant that the husband should do certain things, and only that the *husband* should do certain things, and therefore it was properly decided that the clause did not apply.

The next case cited is *Thornton v. Bright*, and without going into the particulars of that case, *Thornton v. Bright* in fact establishes the same principle. That also was the covenant of the husband only, and it was a covenant that the husband should do certain acts. That case is reported in the 2nd *Mylne & Craig* (a).

The next case that is cited, is a case different in its circumstances, *Butcher v. Butcher*, in the 14th vol. of *Beavan* (b). There the clause was in these terms. It was by the settlement "agreed and declared by and between the parties thereto, and the said *John Butler Hall*" (that was the intended husband) covenanted with the trustees "that in case any personal property should thereafter, during the said intended coverture, come to or vest in Mrs. *Hall*, the petitioner, or in Mr. *Hall* in her right, or by the rights of marriage," not that he would do certain acts, but that "the same should be paid, assigned or transferred by all proper parties without delay from time to time" to the trustees, upon the trusts of the settlement. Now there, it was not the covenant of the husband only, and moreover it was a covenant and agreement, not that the husband alone would do certain acts, but that the property which should come to the

(a) Page 254.

(b) Page 222.

wife should be settled. The present Master of the Rolls having had *Douglas v. Congreve* cited to him, as well as *Thornton v. Bright*, referring to those cases, and stating that in those cases there was nothing but a simple covenant, observes that they contained no covenant or agreement between the other parties. He says, "I am confirmed in the opinion I expressed in this case, that there is a covenant by all parties, including the wife, and that she is as much bound by it as her husband. The usual practice of conveyancers is to make the intended husband alone covenant; but then such a covenant is not prefaced by the words, 'that it is agreed and declared by and between all the parties.'"

1854.  
  
 RAMSDEN  
 v.  
 SMITH.

Another case was referred to, which I believe is not reported (at least I am not aware that it is reported, but I have been furnished with the papers)—a case of *Ewart v. Ewart*, which was decided by the Vice-Chancellor Wood. That case differed again from any of the others in its circumstances. That was a case in which there was not any express language by way of covenant or agreement by any party, but the form of the settlement was this—not a very accurate form, but still it was perfectly operative for the purpose of indicating the intention of the parties—by the settlement, the intended wife assigned to the trustees certain sums of stock and all other the personal settlement which she then was or should thereafter become entitled to. She purported to assign to them the property which she should thereafter become entitled to upon certain trusts; and then, certain property was by her father's will given upon certain trusts, the effect of which was, that she had an absolute power of appointment by deed, and in default of appointment, the property given by the father's will was to go in a certain way among her children. She exercised the power by

1854.  
  
 RAMSDEN  
 v.  
 SMITH.

deed, and by the exercise of her power appointed 1,000*l.* to herself for her separate use, and appointed the rest of the property upon certain trusts. Of course it was not contended, nor could it be contended, that the power to appoint constituted property to which she became entitled; but when she chose to exercise that power, and by the exercise of it settled the 1,000*l.* to herself for her separate use, then that 1,000*l.* was property to which she became entitled, which devolved to and became vested in her, and the Vice-Chancellor *Wood*, (I quite concur in the propriety of his decision, if I may presume to say so,) decided that, as to the 1,000*l.*, that did come within the intention of the parties; that although in strictness an assignment of the property that might thereafter become vested in a party could only operate as a contract, still that was quite sufficient to bind all parties, the wife being, at the time of the marriage, adult and *sui juris*.

Another case was cited, of *Milford v. Peill*, which is reported in the 2nd year or the 2nd vol. of the *Weekly Reporter* (a). There again there is another little difference, I cannot say an immaterial difference. The wife being adult and *sui juris*, immediately before the marriage there was a covenant by the husband and a covenant by the wife, not that the husband should settle the property, but that the property coming to her or to him in her right should be settled by all proper parties.

Now, those are the cases that have been cited on the subject, and those are quite sufficient to establish (if it were necessary to resort to them in order to establish) the principle on which I think this case ought to be decided. As I have said, it is a question of intention, that

(a) Page 181.

intention being to be collected from the terms of the settlement. The property coming to a married woman for her separate use (if it be absolute property, not a mere life interest, that is if the corpus of the property comes to her for her separate use) is clearly property which vests in her or devolves on her, or belongs to her; but the question, whether the parties meant to settle it, must depend upon what they have agreed is to be done, and by whom, in order to designate the property which is intended to be embraced within the covenant.

1854.  
  
 RAMSDEN  
 v.  
 SMITH.

Now, in this case, if it stood only on the covenant of the husband, that alone would be conclusive upon the question; but there are the words, "it is hereby further agreed and declared," and it is contended that those words, irrespective of any special covenant by any particular individual, amount to an agreement by all parties. Now, it is perfectly true, as a general principle, that whenever you have words importing agreement by all parties, it is on the part of each of those parties a covenant, if it be under seal, provided the party who is sought to be charged by the covenant is, by the terms of the instrument according to the agreement of the parties, to do something or not to do something; otherwise, only see the consequence. The trustees are parties to the settlement; and the language is, "it is hereby further agreed and declared," or, if you please to add the words "by and between all parties," which occur in one of those cases, although they do not occur here, and I do not think that makes the least difference. Now can it be said, that is a covenant by the trustees? Is it meant to be contended that the trustees are bound to perform the covenant and the agreement of any party to the settlement, where the agreement is that a particular party shall do a particular thing? It appears to me that in effect the words, "It is

1854.  
~ ~ ~  
RAMSDEN  
v.  
SMITH.

hereby further agreed and declared," operate thus: they operate to show that what is comprised in the clause of which these words are the commencement, is what all parties intend and agree shall be done; and whatever you find in the clause is agreed to be done by any given party, it is an agreement that that party is to do it; but the party who is to do the thing, is the person who is alone bound to perform that agreement.

What then is agreed to be done, and by whom? Because that really is the question here to be decided. Clearly the person who alone according to the terms of the clause is to do anything, is the husband. The agreement is, I will assume, an agreement by all parties that the husband shall make, do and execute, or cause or procure to be made, done and executed, or join or concur with his wife, her heirs, executors and administrators, in making, doing and executing all deeds and assurances necessary to settle the property. Nobody could contend that that was a covenant by the trustees, that the husband should do it, although the trustees are parties to the instrument. Is it then a covenant by the wife? Now just try that question, whether it was the covenant or agreement under seal of the wife, that the husband should do it, so that she is bound to do anything under that covenant? This is the separate property of the wife. The wife alone, without the intervention of the husband, can do anything in order to vest that property in the trustees; the husband can do nothing. Was it the intention of the parties that the wife should covenant that the husband should do something? It would be contrary to the clear reason of the case that the wife should have covenanted that the husband should do a certain act, which she has really no power to compel him to do.

But to go a little further. Take it as the covenant of the husband, to which all parties agree. The covenant of the husband is to do what? To settle his wife's separate property. The husband has no more power to settle the wife's separate property than I have, or anybody else has. So that if you were to construe this instrument as showing an intention or agreement between the parties that the wife's separate property should be comprised in the terms of it, see what an absurd consequence would arise. You would make the wife bind herself by covenant or by agreement, that the husband shall do an act which she has no power to make him do; the act to be done by the husband, being moreover an act which he has no power to do, and which the wife alone can do.

Now I cannot alter the terms of the settlement so as to construe it thus,—that it is an agreement between the parties that the property should be settled. I have no right to do that. I have no right to alter the instrument; I must take it as it stands.

It appears to me that the effect of the instrument is this;—that the words with which the clause begins—"it is hereby further agreed and declared"—(and it would be the same thing if the words were added "by and between all parties hereto") indicate what all the parties had agreed and intended should be done. Then the husband goes on and covenants, not that the property shall be settled by all proper parties (in that case indeed the wife, being a proper party to settle her separate estate, would be bound to settle it); but the covenant is, that is, what the parties have agreed is, that the husband shall do all acts necessary for the purpose.

Then it is said, but here it is not only a covenant or agreement that the husband shall do and execute all proper

1854.

  
RAMSDEN  
v.  
SMITH.



1854.  
~  
RAMSDEN  
v.  
SMITH.

acts, but that he will cause or procure all proper acts to be done and executed, and moreover, more expressly with regard to the wife, that he will join or concur with her, her heirs, executors or administrators, in the making, doing and executing of all such acts, deeds, conveyances, assignments and assurances in the law whatsoever as shall be necessary. What is the effect of that? That he will cause or procure, or he will join and concur with his wife in doing, those acts. As to causing or procuring acts to be done, they must be acts which the husband has the right or power to cause or compel to be done. They cannot apply to acts which the husband has no power to compel to be done; and with regard to the clause "or join or concur with the wife, her heirs, executors or administrators, in the making and doing," although it is perfectly true the husband joining or concurring with the wife in settling the personal property settled to her separate use would be unnecessary and useless, yet we must bear in mind that this clause is a clause which relates to real property coming to the wife, as well as to personal property. With regard to personal property not settled to her separate use, and with regard to real property the *corpus* of which is incapable of being settled to the wife's separate use, it would be necessary for the husband to join and concur with his wife in doing the acts if she chose to do them.

But the question is, is the wife compellable under the terms of these instruments? What is there to make the wife compellable to do these acts? It appears to me that, looking at the instrument itself, independently of any authorities, the intention of the parties was this, that inasmuch as any property coming to the wife being personalty, and any property coming to the wife being real property, would as to the former absolutely, and as to the latter in

a modified form, become the property of the husband (I mean, as to realty, become vested in the husband during the coverture), the intention was that that property which the husband would have any power over or with respect to which any act of his might be necessary to vest that property, should by him and by acts done either by himself or by those whom he had a right to compel to do the acts, be settled; but that it was not intended to settle any separate property. When I look at the authorities, concurring as I do in every one of them, not one of those authorities contravenes the view I have taken; on the contrary, it appears to me the principle established by those cases is the true principle, which, independently of them, I should have arrived at, and which is the very principle on which it is my intention to act in deciding this case.

The effect of my decision will be that the wife will be entitled to the decree which she asks.

1854.  
  
 RAMSDEN  
 v.  
 SMITH.

1854:  
29th May.

Trustees.  
Specialty  
Debt.

WYNCH v. GRANT.

A deed, appointing new trustees, recited, that they had agreed to become trustees, and then assigned the trust premises to them to hold on the trusts of the original deed. There was no express agreement or declaration that they would execute the trusts: Held, that a debt created by a breach of trust, was not a specialty debt.

THIS cause came on on further directions.

The bill was by the children of *Paul Marriott Wynch* and *Martha Wynch* against the executors of *Sir John Peter Grant*, formerly a trustee, and against *William Patrick Grant*, a surviving trustee of the settlement made on the marriage of Mr. and Mrs. *Wynch*, and its object was to recover against the Defendants for a breach of trust, in respect of 50,000 sicca rupees, the subject of the settlement. By the decree on the hearing it was declared that the transaction referred to was a breach of trust. No part of the money was ever used by *Sir John Peter Grant*; but the whole of it by the other trustee, who, however, under certain transactions in *India* and *Scotland*, which it is immaterial to detail, became exonerated and discharged; and the master found that in respect of the breach of trust, *Sir John Peter Grant's* estate was liable to the extent of 7,101*l.* 18*s.* 8*d.* The estate was insufficient to pay this and other debts, if this was to be treated as a specialty debt; and hence it became material to determine whether it was a specialty or a simple contract debt, and this question turned on the language of the deed appointing *Sir John Peter Grant* and *William Patrick Grant* trustees of the fund.

They were appointed by a deed dated in July, 1844, which recited the original settlement and the power contained in it of appointing new trustees, and then it contained the following recital and appointment:—

“And whereas the said *Sophia Martha Wynch*, the

survivor of the said *Paul Marriott Wynch* and *Sophia Martha Wynch*, hath requested the said Sir *John Peter Grant* and *William Patrick Grant* to become trustees for the purposes in the said indenture mentioned in the place and stead of them the said Sir *William Casement* and *Nathaniel Alexander*, to which the said Sir *John Peter Grant* and *William Patrick Grant* have consented and agreed: Now this indenture witnesseth, that by virtue and in pursuance of the power or authority given or reserved to her the said *Sophia Martha Wynch* for that purpose by the hereinbefore in part recited indenture, and in pursuance of all and every other power or powers, authority or authorities, given or reserved to her the said *Sophia Martha Wynch* for that purpose by the hereinbefore in part or otherwise in anywise enabling her in this behalf, and in exercise and part performance thereof, she the said *Sophia Martha Wynch* hath nominated and appointed, and doth by these presents nominate and appoint, the said Sir *John Peter Grant* and *William Patrick Grant* to be trustees in the place and stead of them the said Sir *William Casement* and *Nathaniel Alexander*, to act in the management and execution of the several trusts in and by the said in part recited indenture expressed and declared, or such of them as are now subsisting, undetermined and capable of taking effect. And this indenture further witnesseth, that for the purpose of vesting the monies, funds and securities for money belonging to the trusts of the said in part recited indenture of settlement in the said Sir *John Peter Grant* and *William Patrick Grant*, and for and in consideration of the sum of company's rupees ten, of lawful money of *Bengal*, to the said Sir *William Casement* and *Nathaniel Alexander* in hand, and truly paid by the said Sir *John Peter Grant* and *William Patrick Grant* at or before the sealing and delivery of these presents, the receipt

1854.

WYNCH  
v.  
GRANT.

1854.

WYNCH

v.

GRANT.

whereof is hereby acknowledged, they the said Sir *William Casement* and *Nathaniel Alexander* have, and each of them hath, bargained, sold, assigned, surrendered and transferred by these presents, do and each of them doth bargain, sell, assign, surrender and transfer unto the said Sir *John Peter Grant* and *William Patrick Grant*, their executors, administrators and assigns, all and singular the trust estate, monies and property of the funds and securities in or upon which the same are now placed and vested, which under or by virtue of the said hereinbefore in part recited indenture of settlement are or is in the custody, possession or power of them the said Sir *William Casement* and *Nathaniel Alexander*, or either of them, to have, hold, receive and take all and singular the said trust estate, monies and property, funds and securities, and every part thereof, and other the premises hereinbefore assigned or mentioned or intended so to be, unto the said Sir *John Peter Grant* and *William Patrick Grant*, their executors, administrators and assigns, but nevertheless upon the same trusts and to and for the same ends, intents and purposes, and subject to such and the same powers, provisoes, declarations and agreements, as are contained, mentioned or declared of or concerning the same, or other the estate, monies and property, funds and securities in or by the said hereinbefore in part recited indenture of settlement, or so many of them as are now subsisting, undetermined and capable of taking effect, to and for the intent and purpose that the said Sir *John Peter Grant* and *William Patrick Grant* may be enabled to act in the management and execution of the trusts of the said hereinbefore in part recited indenture of settlement, or such of them as are now subsisting or capable of taking effect, as fully and effectually in all respects, and with the like indemnification as they the said Sir *John Peter Grant* and *William Patrick*

*Grant* might have done in case they had been originally appointed trustees under or by virtue of the said hereinbefore in part recited indenture of settlement."

1854.

WYNCH  
v.  
GRANT.

Mr. *Glasse* and Mr. *A. Smith*, for the Plaintiff.

It is clear that if in a trust deed there are the words "it is declared and agreed," or words equivalent, the debt arising on a breach of trust is a specialty, and it is not necessary to have a covenant in terms. Now here there is an agreement *to hold on the trusts of the settlement*,—that is equivalent to an agreement to execute the trusts. The insertion of an actual declaration is matter of convenience; it is not of necessity, to create the contract. *Ady v. Arnold* (a), it is true, does proceed on such a distinction; but that case proceeds on a misapprehension of the case of *Bartlett v. Hodgson* (b). All that the latter case decides is that the habendum does not constitute a specialty debt as against the *heir*; not that it does not create a specialty debt against the executor. *Ady v. Arnold* is founded on the supposition that *Bartlett v. Hodgson* decided that the habendum creates no specialty whatever. But in this case there is more. The recital of the agreement to become trustees amounts to a covenant to become trustees, and therefore to a covenant to perform the trusts: *Barfoot v. Freswell* (c), *Saltoun v. Houstoun* (d). They cited also on the case generally, *Giffard v. Manley* (e); *Montford v. Lord Cadogan* (f); *Wood v. Hardisty* (g); *Turner v. Wardle* (h).

(a) 16 Jur. 1023.

(b) 1 Term Rep. 42.

(c) 3 Keb. 465.

(d) 1 Bing. 433.

(e) Cas. temp. Talbot,

109.

(f) 19 Ves., see p. 638.

(g) 2 Col. 542.

(h) 7 Sim. 80.

1854.  
  
 WYNCH  
 v.  
 GRANT.

Mr. *H. Clarke*, for Mrs. *Wynch*, the tenant for life under the settlement, in the same interest.

Mr. *Giffard* and Mr. *Cairns*, for the Defendants, were not called on.

The VICE-CHANCELLOR :

I think that the case of *Ady v. Arnold* governs this case. [His Honor referred to the deed appointing Sir *John Peter Grant* and Mr. *Grant* trustees, and observed upon the recital of the agreement, that, assuming it to amount to a covenant, all it imported was an obligation to accept the trusts ; and that the rest of the deed was merely an assignment of the trust property in such manner as to vest the property in the trustees on the trusts of the original settlement. His Honor then proceeded :—] There is no language importing that they undertook or agreed to execute the trusts of the settlement. No doubt the absence of these words would not relieve them from the duty of executing the trusts. But what Lord *St. Leonards*' says in *Ady v. Arnold* clearly applies to this case. He says—"The Courts do not very readily imply a covenant from words that do not import covenant." His lordship is there applying himself to a case where the trustees had executed the deed, and all requisite formalities had been completed, and the question was on the construction of the instrument. Now that case is like the present in this respect. In that case there was a deed appointing certain persons new trustees ; as such they executed the deed : they accepted the trusts, and then the rest of the deed was just as here, not exactly in the same words, but the same in substance. Lord *St. Leonards*' says there are no terms on which a covenant could be raised. This is precisely the same case ; there is nothing

by which the trustees covenant to do any acts or to execute the trusts. True, it is implied by their acceptance of the trusts that they will execute them; but that is because a Court of Equity imposes that duty on trustees, not because there is any express agreement. And this Court does not take a view different from the law as to what constitutes a specialty debt. There is no such thing as an equitable covenant, if there is not a legal covenant. The word *covenant* is not necessary; an agreement under seal is sufficient no doubt; but there must be a legal agreement to do some special acts. Here there is nothing of the kind. The covenant created by the recital (if it is a covenant) is a covenant to *accept the trusts*. Having accepted, the breach consists in not performing the duty; but there is no covenant or agreement to perform the duty. I am of opinion that I could not decide this case differently from *Ady v. Arnold*, without overruling that case. But, independently of being bound by that decision, I see no ground to doubt its justness.

The Plaintiff's claim was therefore held to be merely on simple contract.

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1854.

WYNCH  
v.  
GRANT.



1854:  
27th, 28th and  
29th May.

Trustee.  
Executors.

WAUGH v. WYCHE.

A trustee to uses, with power of sale, which uses, in the event, became executed in *A.* for an absolute estate in fee, was held not liable to *A.* for the purchase money of part of the estates, where the sale was conducted and the money received by the solicitor of the trustee, although the evidence was conflicting whether he acted in the matter by the direction of the trustee or by the direction of *A.*; the conveyance being executed by *A.* alone.

A trustee of the legal estate in a mortgage in trust for *A.*

absolutely, executed a reconveyance, and signed a receipt for the mortgage money, and handed it to one of *A.*'s executors, who was also his own solicitor, and who afterwards misapplied the money: Held, that the money having got into the hands of the executor, the trustee was not liable.

THIS case came on upon objections to the proposed certificate of the chief clerk.

By the settlement made on the marriage of Mr. and Mrs. *Slade*, in 1802, the husband conveyed to *Hezekiah Wyche* and *Edmund Slade* certain estates and hereditaments in the county of *Wilts*, to the use of the husband for life, remainder to the use of the wife for life, remainder to the use of all and every, or such one or more of the child and children of the marriage as the husband and wife during their joint lives should appoint; and in default of such appointment as the said husband should by his last will and testament direct or appoint, and in default thereof, to the use of all the children in tail; and in default of issue, to the husband and his heirs. The deed contained a power of sale for laying out the money arising therefrom in the purchase of other lands and hereditaments in *England*, to be settled to the same uses, and in the meantime to invest the purchase monies in the funds or on mortgage, and to pay the dividends to the persons entitled.

The marriage took effect shortly after the date of the settlement, and there were three children only of the marriage, viz., *William Abbott Slade*, one of the Defend-

ants, *Elizabeth Anne Slade* and *Frances Maria Slade*. The latter died on the 24th day of November, 1840, having attained her age of twenty-one years, intestate. The wife died in 1814.

1854.  
WAUGH  
v.  
WYCHE.


In 1823, *George Smith* was appointed trustee in the room of *Edmund Slade*, and the trust property was conveyed to *Hezekiah Wyche* and *George Smith* accordingly, on the trusts of the settlement.

*Hezekiah Wyche* and *George Smith* sold, in October, 1831, certain parts of the premises comprised in the settlement to Mr. *Thomas Cusse* for 3,000*l.*; no part of the sum was then paid, but the whole was allowed to remain on mortgage of the same premises, and reconveyed accordingly by the said *Thomas Cusse* to *Hezekiah Wyche* and *George Smith* for securing the purchase monies.

*George Smith* died in the month of February, 1837.

*William Slade*, the husband, made his will on the 25th day of November, 1845, and by it appointed all the messuages, hereditaments and premises comprised in the same settlement, and the stocks, funds and securities into which the same, or any part thereof, had been invested or exchanged, to the use and behoof of the said *Elizabeth Anne Slade*, her heirs and assigns, and he appointed her executrix of his will.

He died on the 3rd day of December, 1845, and at his death the trust property consisted, among other things, of the debt of 3,000*l.* due from the said *Thomas Cusse* and some pasture field at *Black Hedge*, near *Warminster*,

1854.  
  
 WAUGH  
 v.  
 WYCHE.

afterwards sold to the *Wilts, Somerset and Weymouth Railway Company*, as hereinafter stated.

After the death of Mr. and Mrs. *Slade* and of *Smith*, but during the life of *Elizabeth Anne Slade*, part of the settled real estate was sold to the *Wilts, Somerset and Weymouth Railway Company* for sums amounting on the whole to 2,635*l.* The conveyances to the Company were made by *Elizabeth Anne Slade* alone. The sales were conducted by *Thomas Eyre Wyche*, the son of *Hezekiah Wyche*, and who acted generally in the matter of the trusts as solicitor of his father. But in the transaction of these sales the balance of evidence was in favour of the assumption that he acted throughout them as the solicitor of Miss *Slade*, except that there was some evidence given by two witnesses, the latter being one of the Plaintiffs, that in 1850 they had conversations with *Hezekiah Wyche*, and he stated to them that the sales had been conducted by *Thomas Eyre Wyche*, and that he had received the money with the knowledge and authority of him, *Hezekiah Wyche*. *Thomas Eyre Wyche* had employed in the sales as his solicitor and agent the witness *Seagram*, and he received the purchase money and paid it to *Thomas Eyre Wyche*. *Thomas Eyre Wyche* misapplied it; and now one question was, whether *Hezekiah Wyche*, the surviving trustee of the settlement, was liable for this money?

With regard to the 3,000*l.* mortgage money due from *Cusse*, he paid off 1,500*l.* during the life of Miss *Slade*. She died in April, 1847, having by her will appointed the Plaintiffs and *Thomas Eyre Wyche* executors, and they proved the will. In 1849, they called for the payment of the remaining 1,500*l.*, and it was obtained in this way: a deed of reconveyance was prepared and executed

by *Hezekiah Wyche* to *Cusse*, and on it was endorsed a receipt by *Hezekiah Wyche* for the purchase money. This deed was by him handed to *Thomas Eyre Wyche*, who placed it in the hands of *Seagram*, who then was the solicitor of the executors. *Seagram* received the money, and thereout retained 900*l.* in payment of a debt due from *Thomas Eyre Wyche* to him: as to the balance, he paid it to *Thomas Eyre Wyche*, who misapplied it. On this state of things the question was, whether as to this sum of 1,500*l.* *Hezekiah Wyche*, as surviving trustee, was liable?

1854.  
WAUGH  
v  
WYCHE.

Mr. *Glasse* and Mr. *C. C. Berkeley*, for the Plaintiff, argued that *Hezekiah Wyche* was liable for both sums.

As to the 2,635*l.*, they relied on the evidence of *Waugh* and *Seagram* to show that *Hezekiah Wyche* had in fact conducted the sale, that his son was his solicitor, and as such received the money. *Hezekiah Wyche* was the surviving trustee, and it was his duty to see that the purchase money got into the hands of Miss *Slade*.

As to the 1,500*l.* clearly he was liable. He signed a receipt for the purchase money; it could not be paid without that; and by so doing he constituted himself the recipient of the money: if in fact he did not actually receive it, he enabled *Thomas Eyre Wyche* to receive it. It might be true that *Thomas Eyre Wyche*, as one of the executors of Miss *Slade*, might lawfully receive the money; but the duty of *Hezekiah Wyche* was first to receive it himself. If he had done that, the same consequences might not have followed; and for those consequences which had followed his irregularity he was answerable. They cited *Ghost v. Waller* (a).

(a) 9 Beav. 497.

1854.  
 WAUGH  
 v.  
 WYCHE.

Mr. *Baily* and Mr. *H. Clarke*, for *Hezekiah Wyche*.

As to the 2,635*l.* they argued, that the result of the evidence showed that *Hezekiah Wyche* had nothing to do at all with the sales. It happened that his son was his solicitor; but in that transaction he acted as the solicitor of Miss *Slade*. She was absolute owner, and could do as she liked. *Hezekiah Wyche* had no right to interfere at all; he could not give a receipt for the money; he was not the person entitled to it legally, nor was he the person to convey, and so the parties treated it, because the conveyance was by Miss *Slade* only. It was not pretended that *Hezekiah Wyche* actually ever received the money; and if he had authorized *Thomas Eyre Wyche* to receive it, which he did not in fact, the attempt to exercise an authority which he did not possess, could not have made him liable.

As to the 1,500*l.*, *Thomas Eyre Wyche* was the proper and legal person to receive the money. The executors called in the money, it was payable to them or any of them. *Seagram*, who did receive it, was the solicitor and agent of the executors. The effect of *Hezekiah Wyche's* receipt and reconveyance was merely to enable, and it did enable, the executor to receive what he was entitled to have paid to him.

Mr. *Glasse* replied.

29th May. The VICE-CHANCELLOR :

As to the 2,635*l.* the matter stands thus :—It was the produce of a sale to a railway company by the trustees of the settlement. [The Vice-Chancellor stated the limitations of the settlement.] After the death of *Slade* and his wife, Miss *Slade* became absolutely entitled as owner

in fee of the estates. The settlement contained the usual powers of sale and exchange, and those powers were given as usual to the releasees to uses. But the moment one of the objects of the settlement became entitled to the fee simple, there was an end of the powers of sale and exchange; the owner in fee might do what she pleased, and accordingly the railway company appears never to have thought it necessary to have the intervention of *Hezekiah Wyche*; they dealt with Miss *Slade* alone through her agent, who was also the son and solicitor of *Hezekiah Wyche*. It is clear that the whole was managed by Miss *Slade* through her agent. She alone was called upon to execute, and she alone did execute the conveyance. She and the railway company being both satisfied, the power of sale being at an end, and Miss *Slade* in possession, there is no ground for saying that *Hezekiah Wyche* had either a duty or a right to receive the purchase money. Why then should he be held liable? I should be quite clear on this if it were not for some little doubt thrown on the transaction by the evidence of Mr. *Waugh* and Mr. *Seagram*, who deposed to a conversation in 1850 with *Hezekiah Wyche*. Now there is this observation to be made on *Seagram's* affidavit, that he speaks of matters as matters of fact for which he has no ground except that *Wyche* told him. Mr. *Waugh* was not examined *vivâ voce*; and Mr. *Seagram's* *vivâ voce* evidence was only taken before the chief clerk. Now if I am to give weight to the evidence of this conversation, it must be after examination of the witnesses before me, to ascertain whether *Hezekiah Wyche* represented the money to have been received by his son as his solicitor. But even if *Hezekiah Wyche* did so consider it, it would not necessarily follow that *Hezekiah Wyche* is liable. However, If I am to give

1854.

WAUGH  
v.  
WYCHE.

1854.  
WAUGH  
v.  
WYCHE.

any weight to the evidence of the conversation, I must examine these witnesses; all the rest of the evidence favoring the inference that *Hezekiah Wyche* had nothing whatever to do with the transaction. [The Vice-Chancellor expressed great doubt whether, even admitting the conversation stated to have taken place, *Hezekiah Wyche* was liable. He offered to the Plaintiffs to have the witnesses *Waugh* and *Seagram* examined, if they desired it. Their counsel declined, and the Vice-Chancellor then decided, that as to this sum *Hezekiah Wyche* was not liable. His Honor then continued.]

The real difficulty is as to the sum of 1,500*l.* That was due from *Cusse* by way of mortgage. The mortgage money and the legal estate were vested in *Hezekiah Wyche* as trustee: he executed a reconveyance on the payment of the money, and he signed a receipt for the money. If there were nothing more in the case, that would be conclusive, and *Hezekiah Wyche* would clearly have to account for that money. But that is not all. [His Honor stated the circumstances of the mortgage by *Cusse* (a).] When *Cusse* paid off the second 1,500*l.*, he did so on the receipt of *Hezekiah Wyche*; and of course he would not have paid it without such receipt, nor without a reconveyance from *Hezekiah Wyche*. But at the time when this took place, not only Mr. and Mrs. *Slade* were dead, but Miss *Slade* was also dead, and her executors, who were entitled to receive the mortgage money, had thought it proper to call it in. Of course that could be done only through the instrumentality of the trustee. The Plaintiffs *Waugh* and *Thomas Eyre Wyche* were the executors; *Thomas Eyre Wyche* was also acting as solicitor of his father the trustee; he filled two characters, that of

(a) Referred to in pp. 319, 320.

executor of Miss *Slade*, and solicitor of his father, her trustee.

1854.

WAUGH


v.

WYCHE.

Now, there is no doubt that the money was received by his agent *Seagram*; but *Seagram* was also the solicitor of the executors. *Seagram* conducted the whole of the transaction. When he received the money, there can be no doubt what he ought to have done: he should have paid it either to *Thomas Eyre Wyche*, or to him and the other executors, or to either of them. In fact, he handed over only about 600*l.*; with the rest he dealt thus: *Seagram* had previously advanced money to the amount of 900*l.* to *Thomas Eyre Wyche*; whether it was advanced to *Thomas Eyre Wyche* for his own individual purposes, or whether to enable him to carry into effect Miss *Slade's* will, does not appear; and I must assume, therefore, it was lent to him; that it was his personal debt. Then, on the receipt of the money by *Seagram*, what he does is to keep back the 900*l.* in satisfaction of *Thomas Eyre Wyche's* debt to him, and to give him the remainder.

Now, the question is, in what capacity did *Seagram* receive that? and in what capacity did *Thomas Eyre Wyche* receive the rest? whether this mortgage money ought to have been paid to the trustee as part of the trust fund, or to the executors of Miss *Slade*; in either case, *Seagram* was clearly a party to a breach of trust on the part of *Thomas Eyre Wyche*, in concurring in the application of part of it in satisfaction of the private debt of the executor; for whether *Thomas Eyre Wyche* acted as the executor of Miss *Slade*, or as agent for his father as trustee, in either case *Seagram* was a party to a breach of trust, in the misapplication of the money. But suppose *Hezekiah Wyche* had received the money into his



1854.  
  
 WAUGH  
 v.  
 WYCHE.

own hands. He might and must have handed it over to the executors of Miss *Slade*. He might have paid it to any one of them, and the receipt of any one would have been a good discharge. Now, the money did come, as to about 600*l.*, into the hands of one of the executors; as to 900*l.*, to the hands of a person who was the solicitor of the executors.

The question is, am I to treat this as a receipt by the executors or by this trustee? Now it appears to me that the test is this. Suppose *Hezekiah Wyche* were wholly insolvent, and a bill were filed by the residuary legatees of Miss *Slade* against the executors, to account for her assets, and, a decree having been made to take the usual accounts, suppose the facts to be proved as here stated, could it be contended that *Thomas Eyre Wyche* would not be responsible, *as executor*, for the 1,500*l.*? Could he say, I had, it is true, the 1,500*l.*; 600*l.* paid to me by my agent, and the remainder accounted for by my agent; but I had it as agent of my father, the trustee? After giving to the matter full consideration, I am clear that he could not. But if there is evidence sufficient to make him liable *as executor*, there is an end of the question of *Hezekiah Wyche's* liability. He could not be liable *as trustee*, if his son received the money and was liable for it *as executor*. When once it got into the hands of the executor, *Hezekiah Wyche* was discharged.

This case does not stand on the same footing as *Ghost v. Waller*. No doubt a trustee, whose duty is to receive trust money and to take care of it, is responsible if he gives a receipt, though he never receives it, and allows thereby another person to receive it who is not entitled. But when the trust is in fact at an end, and the

executors of the party beneficially entitled to the whole, as executors of that person, call in the money, and it comes to their hands, the case is different. I am of opinion that as to this sum of 1,500*l.* *Hezekiah Wyche* is not liable.

1854.  
WAUGH  
v.  
WYCHE.

1854:  
31 May.

Will.  
Construction.  
Vesting.

BICKFORD v. CHALKER.

IN this cause the only material question arose on the construction of the will of *Edward Peters Beer*. He gave certain property on the following trusts:—"Upon trust that the trustees shall pay and apply the clear rents and profits, dividends, interest and annual produce thereof, unto my beloved wife *Mary Beer* and her assigns for and during the term of her natural life, provided she shall so long continue my widow and unmarried. But it is my will and direction, that she the said *Mary Beer* shall apply the same rents, dividends and income, or a competent part thereof, in supporting, maintaining, educating and placing out in the world all and every my child and children who shall be living at the time of my decease, or be born in due time afterwards, in a manner suitable to their station and circumstances. But if my said wife shall marry again during the minority of either of my said children, then upon trust that they my said trustees or trustee for the time being do and shall, immediately after such second marriage, until all and every my afore-said child and children shall have attained the age of twenty-one years, or until the decease of the said *Mary Beer* (which shall first happen), pay and apply the said

A will contained a gift to children and the issue of deceased children, in language which clearly did not vest it in any till the youngest should have attained twenty-one. In a subsequent part there was a declaration as to the vesting of the shares, expressed with much obscurity, and partially inconsistent with the language of the gift: Held, that it must be rejected, and the clear gift must take effect; consequently, that the shares did not vest till the period pre-

scribed, and the representatives of a child, who died before the youngest attained twenty-one, took nothing.

1854.  
BICKFORD  
v.  
CHALKER.

rents and profits, dividends, interest and annual produce, in manner following (that is to say):—as to one-third part or share thereof unto my said wife *Mary Beer* or her assigns for her own separate use and benefit, independent of any future husband and free from his control, debts or engagements, but nevertheless without any power in her to charge or anticipate the same; and as to the remaining two-third parts or shares, or a competent portion thereof, unto the said *Mary Beer* or any other person or persons whom in their discretion they or he shall think fit, to and for the support, maintenance and education of my said child or children respectively, and the placing them out in the world in a manner suitable to their station and circumstances as aforesaid. And *when and so soon as all and every my said child and children shall have attained his, her or their age or respective ages of twenty-one years as aforesaid*, in case my said wife *Mary Beer* shall be then living, then it is my will that my said trustees or trustee for the time being do and shall, during the natural life of my said wife, whether she shall be then sole or covert, stand possessed and interested of and in the said trust estate, monies and premises respectively, and the stocks, funds and securities in or upon which the same or any part thereof shall for the time being be invested, upon the trusts following, that is to say:—as to, for and concerning one moiety or equal one-half part thereof, upon trust to pay and apply the rents and profits, dividends and annual produce thereof, unto and for the only use and benefit of my said wife (whether she shall be covert or sole) and her assigns during her natural life, separate and apart from any future husband, and independent of his control, debts and engagements (without power of anticipation); and as to and concerning the remaining moiety or one-half part or share of the said trust estates, monies and premises respectively, and the

stocks, funds and securities in or upon which the same may be placed, do and shall stand possessed thereof, upon trust *for all and every my said child and children who shall be then living, and also the lawful issue of any child or children who shall be then dead, leaving lawful issue then living, equally to be divided* between the same children and issue respectively, if more than one, share and share alike, as tenants in common ; yet nevertheless so that the issue of such child dying as aforesaid shall take per stirpes only the share of his, her or their deceased parent, and shall take the same share as between themselves in equal subdivided proportions, share and share alike, as tenants in common ; *and also that as well the share of each male of the said children taking under the last-mentioned trust, as also the share of each male of each class of issue respectively taking as aforesaid, shall be respectively vested in him on his attaining his age of twenty-one years, or dying under that age leaving lawful issue living at his death ; and the share of each female of the same children and issue respectively shall be likewise vested in her on her attaining the like age or on her marriage, which shall first happen ;* and moreover, that if any one or more of such children so living at the death of my said wife, or all the issue of any one or more of such children so then dead but leaving issue then alive, shall die, or fail before vesting of his, her or their share or respective shares as aforesaid, then as to and concerning as well the original as accruing share or shares of such child or children or issue so dying as aforesaid, upon trust for the survivor or other survivors or others of the same children and issue taking respectively, equally as tenants in common, and to be vested at the like ages, days or time as are hereinbefore appointed for the vesting of his or their original share or shares ; yet nevertheless so that each class of issue taking under

1854.

BICKFORD  
v.  
CHALKER.

1854.  
BICKFORD  
v.  
CHALKER.

the said last-mentioned trust by way of cross trusts or remainders shall take per stirpes only the share of his, her or their deceased parent, and shall take the same share between themselves equally as tenants in common, and that the subdivided shares, both original and accruing, of the individuals of each class of issue taking under the trusts aforesaid shall be subject to a like trust by way of or in the nature of cross trusts or remainders among themselves in the event of the death or deaths of any one or more of them before the vesting of the same share or shares, in like manner as is hereinbefore directed concerning the original share of the said aforesaid issue and children respectively."

Then there was a provision, after the death of his wife, as to the first-mentioned moiety of the principal, that it should be held "upon, to and for the like trusts, intents and purposes, and with the like provisions in every respect for the benefit of his aforesaid child or children as were thereinbefore declared and expressed for their benefit concerning the last moiety of his said trust estates, and to be vested in and assigned to them at the like ages, days and times, and with the like benefit of survivorship, &c., as before expressed and declared."

Mr. *Swanston* and Mr. *Bazalgette* appeared for the Plaintiffs, children of the testator, who had survived the period when the youngest attained twenty-one.

Mr. *H. Stevens*, for a Defendant in the same interest.

Mr. *J. H. Palmer*, for the representatives of a child who died before the youngest attained twenty-one, argued that the vesting clause controlled the clause of gift, and produced a vesting in each child on his attaining twenty-one, or dying under that age leaving issue.

The VICE-CHANCELLOR:

The testator in this case gave certain parts of his property to trustees on trust to convert and invest the produce. Then he declares, in the first instance, that they are to stand possessed of the proceeds on trust to pay the clear rents, issues and profits of the trust property to his wife for her life. He annexes to that gift to his widow, a condition that she shall employ a competent part of it in maintaining his children. Then there is a clause, of no inconsiderable importance, for the purpose of showing the sense in which he himself uses certain expressions. [His Honor referred to the clause—"But if my said wife shall marry again during the minority of either of my said children, then upon trust, &c., after such marriage, until all and every my aforesaid child and children shall have attained the age of twenty-one years, or until the decease of the said *Mary Beer*, which shall first happen," page 327.]

1854.  
BICKFORD  
v.  
CHALKER.

The testator was here considering the event of his widow remarrying during the minority of any one of her children, and if she remarried during the minority of any one of them, the clause was to apply. [His Honor stated the remainder of the trust, and then proceeded.] Now this puts an interpretation on the language "until all and every of my children," &c.; it means until the last, that is the youngest, of them shall attain the age of twenty-one. When therefore he says "until all and every of my children," &c., he is contemplating a single event, not a series of events. This clause then puts beyond doubt what the testator meant by "until all and every," which is the same expression as we find in the subsequent part of the will on which the question arises. Having then provided for the remarriage of his wife, and having, if

1854.  
BICKFORD  
v.  
CHALKER.

that event does not take place, given her the whole income, with the condition only that she shall maintain her children, then comes the clause of gift. [His Honor referred to the clause commencing "and when and so soon as," page 328.] If the case stood here, there could be no doubt. But then comes the clause which raises the doubt. [His Honor stated the clause declaring when the vesting should take place, page 329.] The first observation that arises on this clause is, that the testator did not mean this to be a gift; he is addressing himself to the case of the children taking under the last-mentioned trust. Then it is said that the clause is absurd as applied to the children of the testator, if the gift to them is to be held only to be on the youngest attaining twenty-one; because if the youngest has attained twenty-one, all the others must. All I can say is, no doubt it is absurd as applied to the children; but it is not incorrect as applicable to the issue of children. The testator had this in his mind. His widow might die before any child attained twenty-one or married under that age; and what he meant was, the shares are not to vest on the death of the widow, *till* the children attain respectively twenty-one.

Now ought I, if I find that the clause of gift is clear, ought I to control it by the vesting clause, which is inapplicable to it as regards the children? Am I to say that the gift is not to be effectual, but the vesting clause is to be so?

I find the clause of gift clear; then the testator afterwards says, the shares of the children and issue shall vest at twenty-one. That is inapplicable consistently with the clause of gift to the children, though not inapplicable as to the issue. I think I ought not to alter the prior clause of gift to give effect to this clause; I must read

the vesting clause as inapplicable to a portion of the objects of gift.

Then as to the clause of gift of the corpus of the other moiety. [The Vice-Chancellor referred to the last clause set out in page 330.] Though according to the language it would seem to apply to children only, and not to issue of children, yet I am persuaded the testator meant that at the death of his widow this moiety was to go as the other moiety, not to the children only living at the time when the youngest should attain twenty-one, excluding their issue, but to such children, and to the issue then living, of any predeceased children.

I am of opinion that there is no ground for excluding the issue of deceased children from this half.

1854.

BICKFORD  
v.  
CHALKER.

NEWTON v. CHORLTON (a).

*Before Vice-Chancellor Wood.*

1853:  
24th March.

*Principal and  
Surety.*

JUDGMENT.—This case of *Newton v. Chorlton* raises before the Court a point with reference to the rights of a surety in respect of a contract of suretyship, as affected by the conduct of the creditor with regard to the principal debtor. I do not find it to be distinctly covered by any of the decided cases, though it is somewhat singular that such a case should not have before occurred and been decided. I think that the authorities, as far as they have gone (in inquiring into which I have been greatly assisted by the argument that has taken place in this cause), the principles that have been settled by the

(a) The Reporter has inserted the judgment in this case from the shorthand writer's notes, as it is referred to and relied upon in the case of *Hopps v. Barker*, reported in a subsequent part of this volume, and is not elsewhere reported.

A creditor, whose debt was secured by the bond of the principal debtor, and a surety, took, after the date of the transaction, further security from the principal debtor, and afterwards gave up that further security: Held, that this did not discharge the surety.



1853.

  
 NEWTON  
 v.

CHOELTON.

decided authorities, enable me to arrive at a tolerably clear conclusion of what are the rights of the parties in this particular case.


The question, in short, is this:—The Plaintiff, *James Newton*, in this cause, having entered into a security for his brother, or rather the party whom the Plaintiff represents, *James Antrobus Newton*, having entered into a bond as surety for his brother, *George William Newton*, to a person of the name of *Edward Reddish*, for the payment of 1,200*l.*, which suretyship was entered into in 1810, it appears that three years afterwards the creditor took a security by way of deposit of certain title deeds of the debtor, with a memorandum in these terms: “I, the undersigned, do hereby acknowledge that the above-mentioned indentures were this day deposited in my hands as an auxiliary security to a bond dated 17th March, 1810, from the said *George William Newton* and *James Antrobus Newton* to me, for securing 600*l.* and interest, and I hereby undertake to return them safe and uncanceled, upon payment being made to me of the said sum of 600*l.* and interest, as witnesseth my hand this 30th day of October, 1813.” Subsequently to this, this security is allowed by Mr. *Reddish*, the principal creditor, to get back into the hands of the debtor, and ultimately the result is, that the security is lost. The question then arises whether or not the surety, in consequence of this subsequent transaction, subsequent to the date of the original contract of suretyship, is released.

Now, as far as the cases have gone, I think they have established certain principles very clearly. The doctrine perhaps is laid down more clearly and lucidly in the case first referred to, of *Craythorne v. Swinburne* (a), in that

(a) 14 Ves. 160.

extremely able argument of Sir *Samuel Romilly's*, and adopted by Lord *Eldon* in that case; and it may be taken clearly, to adopt the words of Sir *Samuel Romilly*, that the whole doctrine as to principal and surety is raised upon the established principles of a Court of Equity; not upon a contract, except as it may be so represented upon the implied knowledge of those principles; it is upon that that the whole of the rest of the argument is founded. I apprehend it is not in one sense strictly contract, when you have arrived at this; that that there are certain fixed principles of equity which follow necessarily from the contract of suretyship, which things must be taken to be known by all the contracting parties, the creditor, the surety and the principal debtor, and which form a part of the suretyship, and in that sense only, a part of the contract. Further than that, it has been established not only in that case, where it was only a dictum of Lord *Eldon's*, but in the case that he refers to *Deering v. Lord Winchelsea*, and in the case which he himself decided of *Mayhew v. Crickett*, which followed it, that a surety is entitled by virtue of the contract, whether he be informed of the security or not, he is entitled, as between himself and the creditor, to the benefit of any mortgage or other security held by the creditor, whether he knows it is held or does not know it is held by him, at the date of the contract. That is decided in *Mayhew v. Crickett*. I apprehend the necessary consequence that flows from this is, that when the parties enter into a contract of suretyship, all the parties agree there shall be the utmost good faith between them, that the situation of the creditor and of the principal debtor should be perfectly made known to all the sureties, and therefore the creditor is conceived to have made known to them, whether he does so or not in fact, every security which he possesses, and the existing position of the parties at the time the contract is entered into. That is put by Lord

1853.  
  
 NEWTON  
 v.  
 CHORLTON.

1853.  
  
 NEWTON  
 v.  
 CHORLTON.

*Truro* very clearly in that case which was under appeal, of *Owen v. Homan* (a), in which he says, "The cases which are reported have generally arisen out of transactions in which there has been personal communication between the creditor and surety, and the clear law deducible from those decisions is, that the creditor must make a full, fair and honest communication of every circumstance calculated to influence the discretion of the surety in entering into the required obligation." Then he compares it to a case of a contract for insurance, in which everything must be made known to the insurer with reference to all the circumstances that surround the contract he is about to enter into. Therefore, I apprehend it is on those grounds that every security of which the creditor has the benefit at the time of the contract being entered into, is supposed to be made known when the surety is entering into the obligation, and the surety is to have the benefit of them, and no act can be done by which he is to be deprived of the benefit, or put in a different position from what he was at the time of the contract being entered into.

The next thing one has to consider, which was very well distinguished in the argument, is what are the equities which are now to form part of this implied contract, as regards first of all the principal debtor; 2ndly, as regards his co-sureties; and 3rdly, as regards the creditor? Now, as regards the principal debtor, I think the authorities amount to this; that the creditor is clearly entitled to have all the debt or liability made good as between himself and the debtor (I am speaking now as between him and the creditor), he is entitled to have the whole liability made good by the principal debtor in the first place; and secondly by every security existing in the hands of the creditor which has been so placed by

(a) 3 M'N. & G 378.

the debtor. As regards his co-sureties, what Lord *Eldon* has said in *Craythorne v. Swinburne* is equity, is equality of contribution; although the creditor has a perfect right to attack any one of the sureties that he pleases, yet as between the co-sureties, the choice of the creditor is not to operate on their condition; they are not to be subjected to his caprice or discretion in his own thirst after his own interest; but, among themselves, they are to contribute equally or rateably if they are bound in different proportions. Then, as regards the creditor, what is the question that arises in the case before me? The question is, what are the rights as between the surety and creditor with reference to the contract they have entered into? As regards the creditor it is decided, first of all, that the creditor is not bound by any thing in the shape of mere negligence; that is quite settled; and it is held that he is bound distinctly to the surety to give him the benefit of every security which he holds at the time of the contract, and he is not allowed in any way to vary the position of the surety with reference to those securities. That has been decided distinctly in the case of *Mayhew v. Crickett* (a) by Lord *Eldon*, where there was a warrant of attorney in the hands of a creditor put into operation by the creditor, and a judgment obtained by him, from which he afterwards discharged the principal debtor. There Lord *Eldon* held it was utterly immaterial whether the warrant of attorney was known to the surety, at the time he entered into the contract or not; the surety had a complete right to the benefit of the warrant of attorney, and if any benefit was lost to him, he was at once discharged. The same point was decided in *Capel v. Butler* (b), in which, at the time of the contract, there was a mortgage of a ship in the hands of the creditor, which the creditor was entitled to sell and repay himself out of the produce: the creditor not

(a) 2nd Swanston, 185.

(b) 2nd Sim. &amp; Stu. 457.

1853.

NEWTON  
v.  
CHORLTON.

1853.  
  
 NEWTON  
 v.  
 CHORLTON.

putting that in force according to the navigation laws, the surety was thereby prejudiced and was discharged *pro tanto* from the contract and liability which he had entered into with the creditor. Therefore so far the case is perfectly clear and free from all doubt. To complete the question of the obligation as between the surety and creditor, one should further say, the surety has a right to put the creditor in motion at all times against the principal debtor; and it is on that ground that all these cases are decided. As to granting time, therefore, if the creditor does any act whatever by which he is prevented from complying with the request of the surety of being put in motion at any time the surety may think fit against the principal debtor, that also will discharge the surety, because he has disabled himself from what I have here called, adopting language of Sir *Samuel Romilly*, the implied contract. All that is settled however by the decided cases as regards the contract between the surety and creditor is this: the surety has a right at any moment to every security held by the creditor at the date of the contract; it has never yet gone beyond that. And he has further a right to say: you must always hold yourself in a position to be placed in motion at my request against the principal debtor.

Now I have gone through that class of cases, before entering into those which approach a more doubtful ground, and which must have to be considered in ultimately arriving at a conclusion in this case. Some of the cases seem to have held the rights of the surety somewhat higher, and to have raised some degree of doubt as to the precise and exact position in which the creditor stands with reference to dealings and transactions with the debtor after the contract of suretyship has been entered into. I apprehend all that has yet been established by the authorities (and it is another

question to say whether equitable principles may or may not carry it further) is, that as between the surety and principal not one iota of the original contract must be varied; every right which existed at the date of that contract must be strictly observed, and there must not be one single transaction in the slightest degree varying the position of the surety as regards the original liability, without communication with him; because, in the event of any such alteration, however it may be alleged to be for the benefit of the surety, unless it is clearly and undeniably for his benefit, as to which there are some authorities, it has always been held that the surety is the best judge of that, and that you must have a communication with him if you wish to vary or depart from the contract; of this there is an instance in the case of *Calvert v. The London Dock Company (a)*, with reference to the performance of a contract, it was said it was beneficial that the contract should be completed; but the Court held it might operate otherwise, and it was a matter upon which the surety had a right to be consulted.

1853.  
  
 NEWTON  
 v.  
 CHORLTON.

That being the case as to all rights at the time of entering into the contract, the question that arises in this case is, what are the sort of dealings that may take place subsequent to the contract, and which did not form part of the original agreement, which may influence the position of the surety? and, with regard to that, Lord *Roslyn*, in the case of *Rees v. Berrington (b)*, laid down the doctrine in a very broad way, which seems, from the subsequent cases, to have caused some confusion. In *Rees v. Berrington* there was a giving of time, which in effect had operated as a discharge. Lord *Roslyn* says "the Defendants have put it out of their power to perform that which the nature of the relation between the surety and the person with whom he is bound requires." But he proceeded to say

(a) 2 Keen, 638.      (b) 2 Ves. jun. 543.

1853.  
  
 NEWTON  
 v.  
 CHORLTON.

this, after commenting on the rule,—“ This produces no inconvenience to any one, for it only amounts to this, that there shall be no transaction with the principal debtor without acquainting the person who has a great interest in it.” (Here, that is laid down broadly, and generally without reference to whether that transaction alters the original contract or not,—that there shall be no transaction with the principal debtor without acquainting the person who has a great interest in it.) “ The surety only engages to make good the deficiency. It is the clearest and most evident equity not to carry on any transaction without the privity of him who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him.” If that is to be taken in its broadest generality it will apply to the case now before the Court. It is a transaction with the principal debtor, and it is a transaction which has taken place without consulting the surety; but that this cannot be taken in its absolute generality, is clear from a number of cases since decided. *Perfect v. Musgrave*(a) I believe was not cited. I believe almost all the cases were cited, some fourteen or fifteen; but, in *Perfect v. Musgrave*, it was attempted by the surety to discharge himself, because the creditor had entered into a subsequent contract, by which he agreed to take ten shillings in the pound, but had not discharged him from the original debt: he said “ I ought to have been acquainted and informed of it.” The Court said, it could not possibly in any way injure you, you stood as you did at the date of the original contract. If any thing, this was done in such a manner that you could not be affected in any other way than beneficially. Then there is the case of *Eyre v. Everett* (b), which goes to a subsequent

(a) 6 Price, 111.

(b) 2 Russ. 381.

dealing of this description :—A party being bound with the principal debtor to secure the payment of the purchase money of certain shares to Messrs. *Everett*, the bankers, they afterwards lent the principal debtor a very large sum, 10,000*l.* or more, I think, than what was due upon the original bond, and entered into a new bond with him for that 10,000*l.* It was attempted to say the sureties were discharged, but Lord *Eldon* said there was nothing that prevented him from contracting a new debt with his debtor; and, although in effect, in one sense, if you are to follow the precise language of *Rees v. Berrington*, it does materially influence the position of the surety in this sense, that it is an act of the principal debtor entering into this new and large engagement, which lessens the chance of payment, yet Lord *Eldon* says it is not any alteration of the contract that existed between them.

1853.  
  
 NEWTON  
 v.  
 CHORLTON.

I think the real result of the whole is this, and I have found no case yet that has gone beyond it, that what you are to take care of is, that the original contract is not disturbed; that you are not in any way to vary any of the rights that existed at the time that the contract was entered into.

There was another class of cases to which I shall now have to advert which have some bearing, but I think when analysed do not carry the point as high as the Plaintiff wishes to place it in this case. What has arisen in this case is, a security taken after the contract for the debt (that of course is beneficial to the surety), and then a handing back of that security to the principal debtor. That is what this case in fact amounts to. Now neither the taking of that nor the handing it back in the slightest degree altered the position of the surety under the original contract; he was not then contracting in any way



1853.  
~  
NEWTON  
v.  
CHORLTON.

for the benefit of any future security to be given by the debtor ; he was not contracting in any way for any future discharge or alteration that might take place between the parties. The principles of equity that have been held to apply hitherto have been these, that he is to have the benefit of all things as they stand, and none of those things are to be varied or altered in the slightest degree whatever. Neither the taking of this or the giving it back affected the rights of the party under the original contract.

Then there arose a class of cases of this description ; although the security is not taken under the original contract, yet if the surety satisfy the creditor the debt, then the creditor having in his hand the securities which have been given him after the original contract as a security for this debt, the surety then becomes entitled, on paying off the creditor, to stand in the shoes of the creditor, and to have the benefit of every security which the creditor then holds. That arises upon a different principle of equity from what may be considered the equities under the original contract. That arises, I apprehend, from this, that the party who pays off any person who holds a mortgage or other security is entitled to have the benefit of all the securities that person so holds in respect of that debt which he has paid off ; he has discharged the liability for which the security is held, and he is entitled to call for an assignment from that party of the security he so holds.


Now the real question and difficulty, and I confess it is rather a nice one, that arises in these cases is this, whether or not it may not be important upon the general principles of equity (I can find no authority upon it) to hold that there is an engagement as between the surety and the principal debtor,—that if the principal debtor at any time after the contract places securities in the hands

of the creditor, the surety, as against the principal debtor, is entitled to the benefit of those securities; and therefore the creditor, knowing that to be his equity against the principal debtor, whenever by any chance he has securities come into his hands, is bound by that knowledge and understanding at the time the contract is entered into, and is bound to retain for the benefit of the surety those securities that so come into his hands? It is a nice question whether that additional equity will or will not be imported into the rule. I find no such case has yet arisen; there is an authority, the case of *Wade v. Coope* (a), the doctrine in which is carefully laid down, as Lord *Eldon* has laid it down, not following quite so lax a description of the equities as is done by Lord *Roslyn* in *Rees v. Berrington*. The doctrine is laid down by Lord *Eldon* in *Mayhew v. Crickett* with very careful restrictions to its being securities existing at the date of the contract, not of course saying that it did not go beyond that, yet always so carefully restricted to that, that when I find it so carefully guarded on the one hand, and when I find that the case of *Wade v. Coope*, which, if not actually decided upon that doctrine, at least has it distinctly laid down by the Vice-Chancellor of *England*, I do not feel myself bound to extend those principles of equity beyond the point to which they have hitherto been carried.

1853.  
  
 NEWTON  
 v.  
 CHORLTON.

Now, with reference to this, it has been very strongly pressed upon me in this way: it has been said, suppose, for instance, you get to this species almost of absurdity,—that the party, the principal debtor, literally comes and deposits with the creditor a sum of money, and says, this I will render available for the payment of your debt; of course it must always be on some conditions, because short of that, it is payment, and the whole case is at an end;

(a) 2 Sim. 155.

1853.  
  
 NEWTON  
 v.  
 CHORLTON.

if payment, the surety is of course discharged by the operation of payment; but suppose the debtor leaves Exchequer bills, and says, "there are the means by which you may at once go into the market and pay yourself;" and then those bills are re-delivered. The surety says, when a man has approached so near to payment as that, it is not in the option of the creditor to relieve him when he is on the verge of payment, and afterwards to fall back on the surety. Those cases do not put it any higher than the case of mortgage; it is either payment or security; one or the other: and there is no reasoning applicable to it to be drawn from the case of *Law v. The East India Company* (a), cited by Mr. Smyth. No doubt, when one analyses that case, it is a case of payment. The case in *Vesey* was that of a surety to the *East India Company* for the accounting of the principal debtor: the principal debtor died, and, on the account being settled, it appeared that originally the *East India Company* conceived that, instead of his owing them money, they owed him money, and settled the account on that footing, and paid him over the balance; afterwards, they found they had made a mistake, and endeavoured to recover the amount against the surety; and what the Court said was this: "it cannot be contended, upon any principle that prevails with regard to principal and surety, that where the principal has left a sufficient fund in the hands of the obligee, and he thinks fit, instead of retaining it in his hands, to pay it back to the principal, the surety can ever be called upon."

I think the rights with regard to the creditor are so clearly put by Lord *Eldon* in the case of *Wright v. Simpson*, that that affords a better guide than any of the other authorities that have been referred to. What Lord *Eldon* says, in *Wright v. Simpson* (b), is this:

(a) 4 Ves. 824.

(b) 6 Ves. 734.

“as to the case of principal and surety in general cases, I never understood that, as between the obligee and surety there was an obligation of active diligence against the principal. If the obligee begins to sue the principal, and afterwards gives time, there the surety has the benefit of it, but the surety is a guarantee, and it is his business to see after the principal person, and not that of the creditor. The holder of the security therefore in general cases may be laid hold of by the surety, and, till very lately, even in circumstances under which the surety would not have had the same benefit that the creditor would have had; but in late cases, that is alluding to bankruptcy, provided there was no risk, delay or expense, as in the case put of the money in the next room indemnifying against the consequences of risk, delay and expense, the surety has a right to call upon the creditor to do the most he can for his benefit, and the latter cases have gone further.” It is now clear that if the surety deposits the money and agrees that the creditor shall be at no expense, he may compel the creditor to prove under a commission of bankruptcy, and get the benefit of an assignment in that way. When one comes to analyse that, what in effect does it amount to? Lord *Eldon* says the creditor is not bound to prove in bankruptcy, although the debt may be wholly lost by his not proving. He is not bound to prove unless the surety put him in motion and indemnify him; nay more, according to the illustration put by Lord *Eldon*, if the money is lying in the next room, the creditor is not obliged to walk into the room and take it, as he puts it there, except the surety will indemnify him against the consequences, if there be any, of his performing that act. He is not bound to stir one step in the matter; and I think when you follow out the principle of that reasoning it is this, that in reality all the surety’s right against the cre-

1853.  
  
 NEWTON  
 v.  
 CHORLTON.

1853.

  
 NEWTON  
 v.


CHORLTON.

ditor is, I claim the right to put you in active motion against the debtor, and until that is done nothing arises between you and me unless it be something that alters our position under the original contract. If you have obtained a subsequent security from any quarter, and I ask you to proceed actually to enforce that subsequent security, on indemnifying you, you must do it; and if I pay you, you must hand over to me that security. Lord Eldon puts the case of the creditor beginning to sue and ceasing. That comes rather nearer to the case in question than any other. If the creditor begins to sue and ceases, then the surety is released. But in another case, before Lord Eldon, on that very point, where *Knight v. Simpson* is cited before him as to what he said in that respect, he says:—"I said that, because if you begin to sue you are only doing what the surety could force you to do, and if you begin to do that which he might force you to do by the process of indemnifying you, if you take that on yourself voluntarily, you are bound to follow it out; then are you liable in respect of laches subsequent to the contract." Now all the cases that have been cited about the surety having a right to the subsequent securities only turn upon this, that any person paying off a debt has a right to take an assignment. The case in *Vernon—Parsons v. Bridgock* (a)—has been adopted in some subsequent cases. In *Wright v. Morley* (b), Sir William Grant cites that case and says it is a very strong case; and Lord Eldon distinctly, in *Craythorne v. Swinburne*, entertained no doubt that if it had not been from the nature of the contract, that showed that it was not a security for the same debt, he would have given the benefit of that subsequent security to the surety on his paying off the debt.

(a) Vol. 2, p. 608.

(b) 11 Ves., see p. 21.

Then comes the case I have lately referred to, of *Wade v. Coope* (a), before the Vice-Chancellor of *England*, which was this :—there being a sum of 1,200*l.* borrowed, which was intended to be secured originally by the security of three several bonds of 400*l.* each, entered into with the principal and one surety to each bond ; it appears one of the sureties did not concur in that arrangement ; however that point was not argued. No doubt he ought to have been discharged on that ground if it was part of the contract that all the bonds should be given, there being only two bonds of 400*l.* each entered into with the principal debtor and his surety. In consequence of a third bond not being given, a mortgage a year or two afterwards was entered into by the principal debtor, by which he secured to the creditor the sum of 1,000*l.* then due on the account. He secured to him 1,000*l.* in respect of what was due upon the contract. That 1,000*l.* mortgage must have included, and in the Vice-Chancellor's judgment he said it did include, or a part of it, the 400*l.* bond for which the surety *Coope*, the Defendant in *Wade v. Coope*, had entered into the contract of suretyship. After that, what took place was this ; a second mortgage was made of this property by the original mortgagor ; and the principal debtor ; then the party who was creditor, holding the first mortgage as a security for his debt, sued *Coope* in respect of his 400*l.* bond ; he recovered the 400*l.* and then *Coope* obtained permission in another suit, in which he fails in getting an injunction, and had to pay the 400*l.* bond to pay off the residue of the debt due on the mortgage, which was 600*l.* and odd, and having paid that residue he gets an assignment of the mortgage. It is not, as Mr. *Smyth* put it, that he was trying to tack this bond on to the mortgage ; the 400*l.* had been recovered at law against Mr. *Coope*, which was an original

1853.  
  
 NEWTON  
 v.  
 CHORLTON.

(a) 2 Sim. 155.

1853.  
~  
NEWTON  
v.  
CHORLTON.

part of the security for 1,200*l.*; it was a part of that debt. What he does in effect in this, he pays off 400*l.*, part of the mortgage, and obtains leave to pay off the remainder and take an assignment of the whole. It was not precisely the case of tacking the bond on to the mortgage; he says, as against the party entitled to the second mortgage, I come in in priority to you although you obtained your second mortgage prior to my having paid my bond and prior to my having obtained power to have the mortgage debt assigned to me. Of course he was entitled to the mortgage; as to the 600*l.* which remained, there was no question; the question was, whether he was entitled to the 400*l.*? The 400*l.* was literally a part of the debt secured by the mortgage; and the Vice-Chancellor held on these two grounds that the Defendant was not entitled to the equity,—one of them was, that he said he never knew an instance in which a party, being a surety for a debt, and a mortgage being given for another debt, of which that was a part and not the whole, was entitled to the benefit of the security. Whether that be so or not may be open to question. He held further that he never knew an instance in which, where the security was given subsequent to the debt, the party had a right to insist on the equity. I think it very possible if that case comes to be sifted, the latter ground will be held the more feasible of the two. He did in effect give a distinct decision that the position of the surety is this,—that he cannot, prior to a payment, insist on any right as vested in himself. No doubt if he had paid off the 400*l.* and had got an assignment before any subsequent mortgage was made, the question would not have arisen. And what I apprehend is really the result of all these cases is this,—you, the surety, may assert all your rights actively whenever you please. When you assert them actively the creditor will be obliged to hand over to you, on your paying him, all the securities he holds not disposed of; if they are

securities held at the date of the original contract you will be entitled to them entirely, because it is a part of the original contract that your position shall not be altered; if they are subsequent, then your right and equity only arises from the time of your putting yourself in active motion, and not before. There was another case cited to me before the Vice-Chancellor of *England*, which I candidly confess I feel a great difficulty in comprehending, that is the case of *Williams v. Owen* (a), in which the Vice-Chancellor held this:—There was a contract which was an actual existing contract for a mortgage, at the date of the contract of suretyship being entered into; and after that, the principal debtor enters into a contract to give the creditor an additional charge for that security, which of course therefore damaged that security to the extent of the additional charge; and yet it was held that the creditor had a right to hold that additional charge against the surety paying off the debt. Now if the principles settled in the case of *Mayhew v. Crickett*, and the other in *Simons and Stuart, Capel v. Butler*, are correct, I should have thought the securities at the date of the original contract could not be altered in any way between the debtor and the surety. The Vice-Chancellor, in *Williams v. Owen*, puts it on grounds which may bear out the case, the actual form of the instrument, and it may rest upon this,—that the surety was privy to the whole transaction, and did not specially contract that there should be no further charge; he did not specially contract that that mortgage should not be altered; and the Vice-Chancellor, if I might venture to express my notion of what fell from him, though it is not so clearly expressed as he was usually in the habit of expressing himself, seems to have thought that the express contract he was looking at amounted to a waiver of the implied

1853.  
  
 NEWTON  
 v.  
 CHORLTON.

(a) 13 Sim. 597.



1853.

NEWTON

v.

CHORLTON.

contract of the suretyship. If so, I can understand the decision of the case, where otherwise it does seem distinctly contrary to *Mayhew v. Crickett*.

I have thought it necessary to go the whole of this length in this case, because I think it is quite possible it may some day or other be appealed from. My opinion is that the party entering into the contract of suretyship does not place himself in such a position with regard to the principal debtor as to enable him to say to the creditor, I have a right to all securities, past, present or to come, against the principal debtor,—whenever you find yourself in the position of holding securities, hold them for my benefit,—you are not to damage me by any dealing with them. It has never yet been so held, and *Wade v. Coope* is an authority the other way. I am therefore of opinion that I cannot, under these circumstances, grant the injunction.

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1854:  
10th June.

*Principal  
and Surety.  
Surety.*

JENKINS v. ROBERTSON.

**T**HIS was a creditors' suit for administering the estate of *James Robertson*. By the decree made on further directions on the 7th May, 1853, it was declared that all the creditors found by the Master's report to be specialty creditors were specialty creditors, except the Plaintiffs. This decree included one *George Nicholson* as a specialty creditor, and gave particular directions as to the payment of *Nicholson*. The debt due to *Nicholson* was due to him from the testator *Robertson* as surety in a bond for one *Snell*. After the decree, *Nicholson* brought an action against *Snell*, the principal debtor, and took a judgment for payment by instalments, without the assent of, or communication with, *Robertson*.

*A.* and *B.* indebted as principal and surety to *C.* *B.* dies, and *C.* in a creditors' suit obtains a decree against his estate. Afterwards *C.* sues *A.*, and takes a judgment by arrangement, giving time, without the knowledge of the surety: Held, this did not discharge the surety.

On a motion now made in the cause on behalf of the representatives of *Nicholson*, a question was raised on behalf of other creditors, whether the transaction above stated had not discharged the surety, and whether therefore *Nicholson's* representatives had any claim?

*Mr. Greene* appeared for the representatives of *Nicholson*.

*Mr. Speed*, for the opposing creditors, contended, that by taking the judgment by arrangement with the principal debtor, without the assent of the surety, the latter was discharged. It would be clearly so if it had been done before the decree; did then the decree make any

1854.  
JENKINS  
v.  
ROBERTSON.

difference? The position of the surety was changed, for the creditor had put it out of his own power to sue the principal debtor on behalf of the surety. The fact of the decree having been made did not prevent this change being prejudicial to the surety. He referred to *Clarke v. Henty* (a).

The VICE-CHANCELLOR, not calling for a reply :

I do not in any degree doubt that, as a general rule, the creditor, by giving time to the principal debtor, discharges the surety; but that is not this case. This is a case in which there is a creditor, who has, by the decree in the suit, established his right against the surety. If he had brought an action against the principal debtor before the decree, and taken, as has been here done, a judgment by arrangement, giving time, no doubt the surety would be discharged. But the creditor, having by the decree established his right against the estate of the surety, has a right to proceed under it; and all that follows is in the nature of execution of the decree, and the subsequent dealing with the principal debtor does not operate to discharge the surety from a liability under which he is, no longer *as surety*, but under the decree.

The objection was therefore overruled.

(a) 3 Y. & Coll. 187.

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1854:  
12th and 14th  
June.

Condition.  
Election.  
Pleading.  
Satisfaction.

HARDINGHAM v. THOMAS.

**T**HE bill was by *George Gatton Hardingham* and *Arabella Hardingham* his wife.

*William Prockter Thomas* was entitled to certain real estates, and, *inter alia*, to an estate called *Cory Barton*, for life, with power to appoint to any children in such manner as he might think fit, with remainders over.

By a deed poll made on the 1st May, 1841, he appointed under the said power the *Cory Barton* estate to the use of his daughter *Arabella*, afterwards *Mrs. Hardingham* (one of the Plaintiffs), and her heirs, subject to his own life estate.

The *Cory Barton* estate was, together with other real estate, charged with two legacies, of 2,000*l.* each, to *Francis Hole* and *Thomas Hole*, and these legacies had not been paid at the time when the deed of the 1st May, 1841, was made.

or husband in her right, might have against the estate; and that the husband and wife were properly joined as Plaintiffs.

A father, having a power of appointment in favour of children, appointed an estate, which was charged with certain legacies, to his daughter. He and she afterwards sold it for 3,700*l.*, and the father received the money, and with it paid off the charges on the estate. Afterwards she married, and on her marriage the father covenanted, as her portion, to pay, within twelve months after his death, 10,000*l.* on the trusts of the settlement, and to pay her 200*l.* a year in the mean time. The transaction of the appointment and sale was not made known to the husband:

Held, that if the father ever intended the appointment for the benefit of the child (and the Court thought he did not), the settlement was a satisfaction of the debt.

A testator by his will gave to his married daughter 2,000*l.* for her separate use, "to be in bar and full discharge of all other claims which she or her said husband might have or make on his estate."

Held, that this was not like a case of election properly, nor a condition of forfeiture; but that the legacy was a discharge, *pro tanto*, of any rights which the wife,

1854.  
HARDINGHAM  
v.  
THOMAS.

By a deed of the 1st May, 1841, made while the Plaintiff Mrs. *Hardingham* was engaged to be married to the other Plaintiff, her husband, to which Mrs. *Hardingham's* father, Mrs. *Hardingham*, then *Arabella Thomas*, and *Francis Hole* and *Thomas Hole*, were parties,—reciting that their legacies had not been paid, and that *John Waller*, another party thereto, had agreed with Mr. *Thomas* and his daughter (the Plaintiff) for the purchase of the *Cory Barton* estate for 3,700*l.*, and that it had been agreed that *Francis* and *Thomas Hole* should release the estate from their legacies, “being fully satisfied that the remainder of the lands charged was abundantly sufficient for answering the payment of the said legacies,”—the *Cory Barton* estate was conveyed, in consideration of the 3,700*l.* expressed to be paid to Mr. *Thomas* and his daughter, to *Waller* in fee; and they covenanted in the usual way for title, and *Francis Hole* and *Thomas Hole* released their legacies.

It was admitted that the Plaintiff never received any part of the 3,700*l.*, but her father received the whole; and it was alleged by the Plaintiff that she never knew, when she executed the deed, what it contained, but executed it by the direction of her father, conveyed through his solicitor.

It was admitted also that the testator *Thomas* paid 3,000*l.*, part of the 3,700*l.*, in discharge of the legacies to *Francis Hole* and *Thomas Hole*; and that the remainder of the legacies was paid, as to part thereof, by the testator, either out of his own monies or out of the proceeds of the sale of other parts of the estates charged, and as to the remainder, by a promissory note.

By the settlement made on the marriage of Mrs. *Hard-*

*ingham*, her father, the testator, covenanted, by way of portion for his daughter, for the payment within twelve calendar months after his death of 10,000*l.* on the trusts of the settlement, and in the meantime for the payment to her of 200*l.* a year. The trusts of the 10,000*l.* were of the ordinary kind, with an ultimate trust for the daughter if there should be no children and she should survive her husband. The transaction of the appointment and sale of the appointed property was never communicated to the husband. The marriage took place in May, 1841.

1854.  
HARDINGHAM  
v.  
THOMAS.

The Plaintiffs claimed against the estate of the testator *Thomas* the 3,700*l.*, as money belonging to *Mrs. Hardingham*, and held by her father in trust for her.

The testator, *Mr. Thomas*, by his will, which was dated the 14th January, 1842, gave to his daughter, described as *Arabella*, the wife of *George Gatton Hardingham*, "the sum of 2,000*l.*, to be paid within two years after my decease, for her separate use (over and above the sum of 10,000*l.*), which is to be paid out of my estate upon or after my decease, by virtue of the settlement executed upon her marriage, *such legacy to be in bar and full discharge of all other claims which she or her said husband may have or make on my estate*; and I declare that her receipt shall be a sufficient discharge for the same legacy."

On this a question was raised whether *Mrs. Hardingham* was not put to her election between this legacy and the other claims, among them the claim to 3,700*l.* which she had against her father's estate; and it was contended, that if *Mrs. Hardingham* claimed the legacy, she ought to have sued by her next friend.

1854.  
HARDINGHAM  
v.  
THOMAS.

Mr. *Follett* and Mr. *J. V. Prior*, for the Plaintiffs  
Mr. and Mrs. *Hardingham*.

On the question, whether Mrs. *Hardingham* was put to her election between the 2,000*l.* legacy and her other claims against the estate of her father, and the consequent question whether the bill ought to have been by her, by her next friend.

The clause in the will is not a condition that if Mrs. *Hardingham* institutes a claim against the testator's estate, her claim to the 2,000*l.* is to be forfeited; it is only a direction that the 2,000*l.* is to be taken in full discharge of any claims which she or her husband may make. The 2,000*l.* is to be taken on the terms of indemnifying the testator's estate against the claim of the husband to that extent. If Mr. *Hardingham* in this suit recovers more than 2,000*l.*, then nothing of the particular legacy of 2,000*l.* will be recovered; that is all. But if nothing, or less than 2,000*l.*, exclusive of the legacy, is recovered, then she is entitled to recover the whole or a proportionate part of the legacy. To have made, therefore, Mrs. *Hardingham* sue by her next friend would be bad pleading; it would be to make her a party to enable her husband to recover something against her own interest.

On the question of the 3,700*l.*

The deed must be taken to describe the transaction correctly, unless a different arrangement is shown; and none is shown. The appointment was in favour of the daughter; the produce of the sale therefore belonged to her. It is not disputed that the father had the money; he took it therefore as a trustee for her; and no person now claiming under him can come and say that he is entitled to any part of it.

Mr. *Glasse* and Mr. *Rogers*, for some of the Defendants, and Mr. *Baily* and Mr. *Goldsmid*, for other Defendants in the same interest, opposed the Plaintiffs' claims.

1854.  
  
**HARDINGHAM**  
 v.  
**THOMAS.**

If there ever was any claim in Mrs. *Hardingham* to the 3,700*l.* it was satisfied by the father's covenant on her marriage to settle on her 10,000*l.*, and to pay her an annuity: *Wood v. Briant* (a); *Plunkett v. Lewis* (b). But there never was any claim in Mrs. *Hardingham*; it is plain the father never intended the appointment to enure for her benefit.

As to the 2,000*l.* legacy. Mrs. *Hardingham* ought to have sued for that by her next friend; it is to her separate use and in bar of all claims. If her husband claims anything, her legacy is gone, and therefore they ought not to be joined.

Mr. *Follett*, in reply.

There is nothing to show that the plaintiff's father did not intend to give her the benefit of the appointment; and the language of the deed must therefore have its ordinary effect, and the money having come to *Thomas's* hands, was a debt to the daughter.

Then it is said the settlement was a satisfaction of that debt; that it was so intended. But, first, a settlement by a mere covenant to pay money at a fixed future time, is not satisfaction. The cases are all where there has been immediate payment. But where the money alleged to be intended in satisfaction, is only payable on the father's death, no case shows that that is satisfaction. Here the covenant is to pay twelve months after the

(a) 2 Atk. 521. cases collected in 2 Rep.  
 (b) 3 Hare, 330, and the Leg. 57.



1854.  
  
 HARDINGHAM  
 v.  
 THOMAS.

father's death; but the 3,700*l.*, assuming it as I do to have been a debt, was payable immediately on the father's death.

As to the legacy of 2,000*l.*, that is only to be a payment *pro tanto*. If Mrs. *Hardingham* recovers it, it is only a discharge of the estate as against the husband *pro tanto*, and the Plaintiff and her husband are therefore properly joined.

A material question arose also as to costs. The bill originally made extensive statements, which were answered, and then by amendment these statements were struck out as untenable. The Defendants claimed to have the costs which they had been put to by the pleadings, &c., rendered necessary by the abandoned statements. They cited *Mavor v. Dry* (a); *Masserene v. Lyndon* (b); *Monck v. Lord Tankerville* (c); *Delawney v. Delawney* (d).

There were other questions, but these were the questions most material, and principally argued.

The VICE-CHANCELLOR:

14th June.  
 Judgment.

On the 1st of May, 1841, *William Prockter Thomas* appointed to the Plaintiff, Mrs. *Hardingham*, one of his three daughters, the *Cory Barton* estate, subject to his life interest; and by a deed dated the 4th May, the Plaintiff and her father conveyed the appointed estate to *Waller*, for 3,700*l.*

It is not stated when the deed of the 1st May

(a) 2 Sim. & Stu. 113.

(c) 10 Sim. 284.

(b) 2 B. C. C. 291.

(d) 14 Law J. (N.S.) 50.

was executed. However, it is obvious to me that the two instruments were parts of one transaction. At the time of this transaction, the Plaintiff was about to be married, and a settlement was made, by which the father covenanted that his representatives should pay, after his death, 10,000*l.* on the trusts of the settlement, and that in the meantime he or they should pay her 200*l.* a year.

1854.  
  
 HARDINGHAM  
 v.  
 THOMAS.

Now there are three possible theories in explanation of this transaction. The first is, that the appointment was intended as a *bonâ fide* appointment for the benefit of Mrs. *Hardingham*; and the sale to *Waller* only intended to carry out that, that she might have the benefit either in the shape of the estate, or of the produce of the sale of it. The second theory is, that in fact Mr. *Thomas* intended a benefit to himself, and used this machinery of the power in order to get the estate sold, that he might be enabled to receive the produce. That would of course be a fraud on the power, a fraud altogether, and void as against Mrs. *Hardingham*. The third theory is, that the intention was to use the machinery of the appointment for the purpose of realizing the property, in order to discharge the *Cory Barton* estate from certain charges upon it. Now, if I were under the necessity of deciding on the facts as they stand, and assuming the facts to be as they are represented, I think the very last of these theories that I should adopt, would be the one first suggested. I think my choice would lie between the other two, and would rather be for the third. However, it is not material which is the correct view, because, as I understand, 3,000*l.* was paid in discharge of the legacies to Messrs. *Hole* out of the 3,700*l.*, and the deed contains a statement that the Messrs. *Hole* concur in releasing the *Cory Barton* estate. On the face of that statement they do not, it is true, allude to that payment; however,

1854.  
HARDINGHAM  
v.  
THOMAS.

if the fact be that out of the 3,700*l.*, 3,000*l.* was paid to the legatees, with 200*l.* more afterwards, and that at a subsequent period Mr. *Thomas* paid out of his money, or at all events paid the 4,000*l.*, I think I ought to come to the conclusion that there was no intention to make this appointment for the benefit of the Plaintiff, but that the intention was either for the benefit of Mr. *Thomas*, in fraud of the power, or what would be in a sense also for the benefit of Mr. *Thomas*, for the benefit of the estate, by freeing it from the charges.

The Plaintiff does not suggest that any thing was said by her father that he intended to appoint to her for her benefit. But surely, if the father had so intended, he would in some of his communications have stated it. If he communicated any thing to her, he must have communicated to her that it was his intention to benefit her, if that was his intention. She does not appear to have considered that she was to benefit. Then, after she married, there was no communication to Mr. *Hardingham* on the subject. If the 3,700*l.* were really in the father's hands as trust money, it would be a strange thing that no notice of that fact should be given to the husband. By the settlement the father covenanted to pay 10,000*l.*, and to settle on his daughter 200*l.* a year in the mean time. That was what he meant for her provision; and, *primâ facie*, it would be in satisfaction of the previous provision. But then it is said that, in cases where the question has arisen as to legacies, the Court has looked at the circumstances of variation in interest or time, which would rebut the presumption of satisfaction. But here the claim of Mrs. *Hardingham*, if she had one, is for 3,700*l.* Now, the 10,000*l.* is, it is true, not due at the death of the father, but twelve months after, and in the mean time, instead of interest, he covenants to pay to his

daughter 200*l.*, which is much more than the interest of 3,700*l.* Can it, under these circumstances, be supposed that it was the intention of the parties that the 3,700*l.* was to remain in the hands of Mr. *Thomas* as a trustee for his daughter? It appears to me that, on the ground of intention, there is no foundation at all for the claim; that it was not the intention of the Plaintiff himself, or of any of the parties to the transaction, that any benefit should arise to her from the appointment of the *Cory Barton* estate to her, or from the 3,700*l.*

1854.  
HARDINGHAM  
v.  
THOMAS.

The next point is as to the election of Mrs. *Hardingham*, under the will of her father, between the legacy of 2,000*l.* bequeathed by that will, and the other claims she now puts forward against the estate of the testator.

Now, this is not like the case of a legacy to *A.*, a married woman, in bar of the dower which *A.* may take. It is a legacy to *A.* in bar and discharge of all the claims which she or her husband may make against the testator's estate. Whatever were the rights that the husband had, no legacy given to his wife for her separate use can prejudice his claim to such rights as he has; if he chooses to assert them, his wife cannot prevent him. But the legacy being given in bar and discharge of any claim which the wife or her husband have, if the husband, claiming by the marriage, insists on his right to enforce any payments due to him from the estate of *Prockter*, then the 2,000*l.* legacy, so far as there has been any payment of it to the Plaintiff, must be applied, *pro tanto*, in recouping the estate against what Mr. *Hardingham* claims. If I were to compel this suit to be by Mrs. *Hardingham* alone, I should be in fact compelling Mr. *Hardingham* to sacrifice his rights. I think, there-

1854.

  
HARDINGHAM  
v.  
THOMAS.

fore, it is not necessary that the bill should have been by Mrs. *Hardingham*, by her next friend.

On the question of the costs of the unsupported statements of the bill, the Vice-Chancellor was of opinion that, being struck out, and there being no evidence upon them, he had nothing before him to show whether they were unreasonable or not. He could not assume them against the Plaintiff to have been absurd and unreasonable, and could not, therefore, distinguish those costs from the general costs.

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1854:  
25th April and  
4th July.

*Feme Coverte.  
Separate Estate.  
General Power  
of Appointment  
by Will.  
Fraud.*

VAUGHAN v. VANDERSTEGEN (a).

**T**HIS came on to have a point argued not raised on the original hearing.

Mr. *Baily* and Mr. *Smythe*, for *Gates*, contended, that assuming the appointment of Lady *Dunboyne* not to take effect in favour of her creditors, if there had been no fraud, yet the fraud practised by her in holding herself out to be a feme sole, would have the effect during her life of depriving her of the benefit of her disability, and had the same effect as regarded those who claimed under her appointment; that it placed her in the same position as if she had been, what she represented herself to be, a feme sole. Consequently, her appointment enured by reason of the fraud for the benefit of the cre-

A married woman had a life estate in personalty to her separate use, with a general power of appointment by will, and, in default of appointment, over. She had also real estate similarly settled, except that, in default of appointment, the ultimate limitation was to her and her heirs, so that her husband should not be benefited by the curtesy.

(a) See this case reported on the principal point, ante, p. 289. The facts there stated are sufficient for the purpose of the point on which the case was further argued.

She borrowed money, fraudulently representing herself to be single, and purported to execute a mortgage of some of the settled real estate, with the ordinary covenant to pay. Afterwards, she by will appointed her freehold and personal estate chiefly to her children, and then died:

Held, that, by the fraud, the married woman made the appointed estate liable as general assets, as if she had been a feme sole in respect of it; and that the mortgagee had a right not only to a charge on the mortgaged real estate to which she was entitled in remainder, but, if it was not sufficient, he was, by reason of the fraud, to rank as a creditor on her general assets, and to take the appointed personal fund, if there was not enough without.

The decision in *Vaughan v. Vanderstegen*, ante, p. 165, confirmed, where there is no fraud.

1854.  
  
 VAUGHAN  
 v.  
 VANDER-  
 STEGEN.

ditors. They cited *Savage v. Foster* (a); *Stead v. Clay* (b); *Rawlings v. Bell* (c); *Jones v. Kearney* (d); *Hughes v. Wells* (e); *Shipton v. Rawlins* (f); *Wright v. Snowe* (g); *Evroy v. Nicholas* (h); *Watts v. Creswell* (i); *Cory v. Gertcken* (k); *Overton v. Banister* (l); *Stikeman v. Dawson* (m); *Clayton v. Adams* (n).

Mr. Glasse, for Mr. *Waugh*, another creditor, stated that his debt was created in 1842, before the marriage with Lord *Dunboyne*, and as her husband survived her, the debt was payable out of her general estate; therefore the execution of the power would enure for the benefit of the creditor: *Woodman v. Chapman* (o).

Mr. *Willcock*, for *Harvey* and wife.

In *Savage v. Foster*, the widow having been guilty while coverte, of fraud, the Court compelled her to do what she was capable of doing to complete the title of the purchaser, whom she had by fraud allowed to purchase without giving him notice of her title.

But could the Court here have decreed Lady *Dunboyne* to make a will? Could it have decreed that she should never revoke? and if it did, and she did nevertheless revoke, and die, would that decree bind a stranger to

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| (a) 9 Mod. 35.              | (h) 2 Eq. Ca. Abr. 488; |
| (b) 1 Sim. 294, and 4 Russ. | 1 De G. & Sma. 118, n.  |
| 550.                        | (i) 9 Vin. 415.         |
| (c) 1 C. B. Rep. 951.       | (k) 2 Madd. 40.         |
| (d) 1 Dru. & War. 134.      | (l) 3 Hare, 503.        |
| (e) 9 Hare, 749.            | (m) 1 De G. & Sma. 90.  |
| (f) 4 Hare, 619.            | (n) 6 T. Rep. 604.      |
| (g) 2 De G. & Sma. 321.     | (o) 1 Camp. 189.        |

it? Fraud cannot have a greater effect than any contract she could make. He referred to *Kellaway v. Johnson* (a). The effect of the cases cited on the other side is merely this:—A married woman who has contracted a debt or a liability, representing herself to be sole, shall not have the active interference of this Court in her favour; not that this Court can, in favour of the party defrauded, attach property over which the feme coverte had only a power of appointment. The Court in this case could not have compelled her to make a will, and a deed she had no power to make; nor could she do any act which could make her will irrevocable. As to the real estate, she purported to create a mortgage, and nothing more. That has been decided in the cause to be bad. Can the Court then say she has done, or shall be held to have done, something else to bind the estate intended to be mortgaged?

Mr. *Faber* with him.

It is said that as to Mr. *Gates*' debt, it is a liability arising out of a fraud, which makes a married woman liable as a feme sole. If that were so, at any rate, first the general estate must be applied, and the real estate descended must be applied before the appointed property could be touched.

But as to the fraud. In *Savage v. Foster*, the principal case on the other side, the married woman was compelled to complete her conveyance; that is all that was done, and there is no authority for coming, after the death of a feme coverte, against the property which she has appointed. *Stead v. Clay* is only a case of injunc-

(a) 5 Beav. 319.

1854.  
VAUGHAN  
v.  
VANDER-  
STEGEN.



1854.  
  
 VAUGHAN  
 v.  
 VANDER-  
 STEGEN.

tion, and it was not in that case necessary to determine more than that there might be a case, and no more was determined.

Mr. *Ellis* appeared for the trustees of the settlement.

Mr. *Daniell* and Mr. *Greene*, for the Plaintiffs.

If the fraud had been discovered during the life of Lady *Dunboyne*, it may be that the Court would have interfered to act upon her so far as it could. But now that she is dead, and new rights have arisen in third persons, how can they be affected? The proposition on the other side is, that by fraud Lady *Dunboyne* could acquire a power of disposition which she had not by law. How can such a proposition be maintained? They referred to *Home v. Derbyshire* (a).

Further, *Gates* is not in possession; he comes for active interference against parties claiming innocently. They had nothing to do with the fraud. *Savage v. Foster* does not therefore touch this case, that being a case in which the party committing the fraud was the party claiming the benefit of her disability. Besides, that case is not law, for it has been decided, in *Jordan v. Jones* (b), that the Court cannot compel a married woman to execute a disentailing deed.

Mr. *Baily*, in reply, referred to the registrar's note of *Norton v. Turvill* (c), as a case directly in point. He cited also *Dowell v. Dew* (d).

(a) 5 De G. & Sma. 702;      (c) 2 P. Will. 144.  
 on appeal, 3 De G. M'N. &      (d) 1 You. & Col. (Ch.)  
 Gord. 80.      345.  
 (b) 2 Phil. 170.

The VICE-CHANCELLOR :

Sometime after I had pronounced my opinion on the first argument of this case of *Vaughan v. Vanderstegen*, two cases were mentioned by counsel which were considered to be authorities in favour of an opposite conclusion to that at which I had arrived. The conclusion at which I had arrived was, that property appointed by a married woman under a power was not liable, in the ordinary case, to her (so called) debts contracted by her during coverture. I have examined the two cases which have been cited, and I have reconsidered the whole subject; and the result is, that I find myself entirely confirmed in the opinion which I before expressed on the general question. At the same time, I was led to think, that, consistently with the view which I entertained on the general question, there were certain circumstances attending the cases of two of the persons claiming to be creditors, namely, Mr. *Gates* and Mr. *Waugh*, which might entitle them to stand on a different footing from ordinary creditors, or persons claiming to be ordinary creditors; and I was, therefore, desirous that the matter should be re-argued on that point; and the argument naturally led to something of re-argument of the whole case, which I did not discourage, because I was very glad to be assisted by counsel in the matter. I will now state my opinion with regard to those two claimants, premising some observations on the general question in addition to those which I made on a former occasion.

That, as a general rule, a married woman cannot contract an ordinary debt, is a proposition, I apprehend, too clear to admit of any controversy. If a person lends money to a married woman, whether it be lent to her on bond or note, or on mere verbal promise to pay, or if he sells her goods, he cannot recover the money lent, or the

1854.

VAUGHAN

v.

VANDER-  
STEGEN.

4th July.  
*Judgment.*

1854.  
VAUGHAN  
v.  
VANDER-  
STEGEN.

value of the goods supplied, from her, either during the coverture or after she becomes a widow, in case she survives her husband. Nor can he recover it after her death from her executors or administrators. If the goods supplied are goods necessary to maintain her in the condition of life in which she stands, her husband having omitted to supply her therewith, or if the money be lent to her for the purpose of procuring such necessaries, the debt is the debt of the husband—the husband is liable for it—it is not the debt of the wife. If he supplies her with goods beyond what are necessaries, having regard to her condition, or lends her money beyond that point, he cannot recover it, either from the husband or from the wife; at all events the wife is not liable. That general proposition, I apprehend, does not admit of any controversy; and the case, which is frequently referred to in the books as an exception to that, like every other exception, founded on a special reason, establishes the rule. I mean the case where, by the custom of London, a married woman carries on a trade on her own account exclusively, her husband not in any way interfering with it; by the custom of London, for that special reason, a married woman can contract a debt. But, as I have said, that exception, founded on a special reason, in fact establishes the general rule. And this general rule is not merely a rule of law, it is a rule of equity. A Court of equity regards that rule just as much as a Court of law does, subject to the exception of the special case of property settled to the separate use of a married woman, which I will consider in a moment. If the assets of a married woman are being administered in a Court of equity, a person, claiming as a creditor by reason of a contract she has made during her coverture for money lent or goods supplied, could never be allowed to stand as a creditor against her general assets.

But a Court of Equity has established this well known principle, that property may be so settled to the separate use of a married woman, that, in respect of the property thus settled, she is, in fact, constituted a feme sole. In respect of that particular property, but only to the extent of property so settled, she is regarded as a feme sole, having all those rights and incidents which a feme sole has in respect of her property,—the right of enjoying the property, the right of disposing of the property as she pleases, and the right and capacity to contract debts in respect of such property, that is, payable out of such property. But, of course, her condition as a feme sole, or as being regarded in the light of a feme sole, is limited entirely by the extent of the property which is thus settled to her separate use; and if property be settled to her separate use and she contracts debts, so far as the property settled to her separate use will extend it will be liable to pay her debts; but any other property she is owner of, whether real or personal, would not be liable to pay those debts, any more than if she had no property at all settled to her separate use.

Then comes the question, which was in fact the point mainly argued—the question, whether property which is made subject to a power of appointment by a married woman is property settled to her separate use? It was contended, that if property is limited subject to a power of appointment by a married woman, that property is property standing settled to her separate use, and the argument in support of it (I think I may say the only argument, but certainly the main argument in support of it) was this,—that if she have a power of appointment, she may, by the exercise of that power, dispose of the property without the intervention of her husband; and therefore it is property settled to her separate use.

1854.

VAUGHAN  
v.  
VANDER-  
STEGEN.


1854.  
~  
VAUGHAN  
v.  
VANDER-  
STEGEN.

In fact, the argument stands thus :—property settled to the separate use of a married woman may be disposed of by her without the intervention of her husband ; property which she has the power to appoint may be disposed of by her without the intervention of her husband ; therefore the one is the same thing as the other, that is, that there being two things which have one quality or incident in common, therefore they are the same thing. Now that is reasoning which I confess I cannot accede to.

Let us consider the matter a little further. When it is contended that property which is subject to the appointment of a married woman under a power given to her is property settled to her separate use, does the proposition mean this,—that while the power exists, and before it has been exercised, it is property settled to her separate use ? Suppose property is limited to a married woman for her life, with a limitation to her children, and in default of children living at her death, or in default of issue living at her death, then it is limited to such uses or upon such trusts, or for the benefit of such persons as she shall by deed or will appoint, or as she shall by will appoint. Does the proposition mean that, in that state of things, when nothing has been done, the property then stands settled to her separate use ? I suppose that must be the meaning of the proposition, because the argument is, that she has power to dispose of it independently of her husband, and for that reason it is property settled to her separate use. Therefore when the proposition is examined it must mean that when property is subject to her appointment, before she has exercised the power at all, it stands limited to her separate use, because she may dispose of it by exercising the power without the intervention of her husband.

Now, let us consider that for a moment. In the first place, is it settled to her use at all? Take the case of a man; a man has a power of appointment. Is that property limited to his use? Clearly not. And it signifies nothing whether the donee of the power is a man or a married woman; in neither case is the property limited to the use of the donee of the power. If it is not limited to the use of the married woman at all, which of course it is not, how can it be limited to her separate use? I confess it appears to me a proposition which requires only a little consideration to show how entirely untenable it is. How can property stand settled to the separate use of a married woman when it does not stand settled to her use at all? Now this may be placed in a more obvious, and perhaps more striking light, by just taking this very case of *Lady Dunboyne* which is now before me. Here was property limited to the use or for the benefit of a married woman for her life, and after her death, in the event of there being no children (it is no matter whether there be the intervention of children or not), it is to go as she shall by will appoint. Now, how is it possible to say that that reversion or remainder, expectant on her death, stands limited to her separate use? It is true it has one of the incidents of property limited to her separate use, namely, that she may dispose of it (but only by a particular act and in a particular manner) without the intervention of her husband. But has it the other incidents of property limited to the separate use? Can she deal with it as she likes? If property is limited to the separate use of a married woman she may deal with it in any way in which a feme sole or a man may deal with it. But that is not the case here. She cannot enjoy it, she cannot dispose of it, except by doing a particular act. In short, it is no more property settled to her separate use than property which is her own fee

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1854.  
  
 VAUGHAN  
 v.  
 VANDER-  
 STEGEN.

1854.

~  
VAUGHAN  
v.  
VANDER-  
STEGEN.

simple estate. The mere incident of its being disposable by a particular act without the intervention of her husband cannot make it property settled to her separate use.

But look a little further. The doctrine, that property may be settled to the separate use of a married woman, is a doctrine exclusively of a Court of Equity. It was created by a Court of Equity; it is exclusively cognizable by a Court of Equity. A Court of Law knows no more about the doctrine of property settled to the separate use of a married woman than it does of an equity of redemption, or of any other matter which is exclusively the creation, and within the jurisdiction, of a Court of Equity. Now, if that be so, take an ordinary case. I will take the case of real estate, because that may stand limited to uses, so as to admit of the limitation of legal estates in remainder. Suppose real estate limited to the use of a married woman for life, and after her death to the use of such persons as she shall by deed or will appoint, or as she shall by will appoint, with a limitation in default of appointment to the use of a stranger in fee. These are legal estates, with a legal power. If she exercises the power, the estates which she creates by the exercise of the power are legal estates. The power, and the exercise of the power, and the estates created under it, are under the exclusive jurisdiction and cognizance of a Court of Law. But the proposition is, that because it is a power which she may exercise without the intervention of her husband, the remainder is settled to her separate use. If it be so, then the doctrine of separate use in a married woman, and of her being regarded as a feme sole in respect of property so settled, so far from being the exclusive doctrine of a Court of Equity (as up to this hour has been invariably asserted or assumed) is in fact equally recognized and acted upon by Courts of Law.

Now really, when these matters are considered, it appears to me, that the proposition, that a power of appointment in a married woman is property settled to her separate use, is a mere confusion of the boundaries between property and power, between estate and power, which now at least, after so many years and centuries of discussion, I conceive to be clearly established; and if we introduce confusion between property and power, we really unsettle all the principles of law applicable to property. An estate limited either to the use of a married woman, or in trust for a married woman, whether it be for life or in fee, is the married woman's property, just as it is in the case of a man or a feme sole; but property limited to such uses or upon such trusts as she shall appoint, whether it be by way of present interest, or by way of reversion or remainder, is not property in the married woman at all, but simply power.

Now, as this was the point on which the argument mainly turned, I would wish to suggest a few cases of the most ordinary occurrence, without searching for rare and uncommon cases, for the purpose of illustrating what I conceive to be the principle applicable to this question. Let me take the case, first of all, where property is limited to such uses, or in such manner, or upon such trusts, as a married woman shall appoint, where the power is created before her marriage. Let me take the case of real estate standing limited to the use (and I take legal estates now in the first instance) of *A.* for life, with remainder to *A.*'s children, and, in default of *A.*'s children, with remainder to such uses as *B.*, a feme sole, shall appoint. Or, which will be just the same thing, suppose the life estate is limited to the use of *B.*, a feme sole, with a limitation to her children, and in default of children to such uses as she, the feme sole, shall appoint, and she is still

1854.

VAUGHAN  
v.  
VANDER-  
STEGEN.



1854.

VAUGHAN  
v.  
VANDER-  
STEGEN.

a feme sole—will any body say that that remainder or reversion is limited to her separate use? Nobody, I presume, will contend it is so. In that state of things, the woman marries, no new settlement of this property being made. Does that marriage make this power suddenly become property settled to her separate use? By what contrivance, by what process, is that done? Well, here then we have the case in which property in remainder or reversion stands limited to such uses as a married woman shall appoint, she having had the power before she married, and then having married. Is this property settled to her separate use? No; it has not been contended it is; and yet she may dispose of that, independently of her husband. Therefore, it is not merely because it possesses the incident of being disposable by the wife independently of her husband, that it is property settled to her separate use; and if it be a legal power, it cannot be her separate property, because a Court of Equity has nothing to do with it—a Court of Law alone has cognizance of it. Now, instead of legal estates and a legal power, suppose the estates and the power to be equitable, the case being in all other respects the same. Property stands limited to trustees in trust for a feme sole for her life, or in trust for A., a stranger, for his life, and after the death of the tenant for life, in trust for such uses as the feme sole shall by deed or will, or by will only, appoint. Well, before her marriage, no one would contend that such reversion is settled to her separate use. Then she marries. Upon what principle does the power become thereby property settled to her separate use. It is not because it is an equitable power that it becomes property settled to her separate use. The reason why a Court of Equity deals with the power, and the estates which may be created by its exercise, is not because it has any peculiar jurisdiction to enable a

married woman to exercise a power of appointment. A Court of Law does that. That a married woman has the right and capacity to exercise a power of appointment, is as much the doctrine of a Court of Law as it is of a Court of Equity—it is not necessary she should be regarded as a feme sole, in order to do that. The only reason why, in the latter case, a Court of Equity deals with it is, that the estates and the power being equitable, they are under the exclusive jurisdiction of a Court of Equity; but, in exercising that jurisdiction, a Court of Equity recognises and maintains (just as a Court of Law does) the broad distinction between property and power; what a Court of Law regards as property or estate, where the limitations are legal, that a Court of Equity equally regards as property or estate, where the limitations are equitable; and what a Court of Law regards as power, where the limitations are legal, that a Court of Equity equally regards as power, where the limitations are equitable; and a Court of Equity can no more regard a power of appointment vested in a married woman as property settled to the separate use of the donee of the power, than a Court of Law can regard a legal power vested in a man as property settled to the use of the donee of the power.

Does it then make any difference in either of those supposed cases—either in the case where the estates are legal, or in the case where they are equitable estates—whether the prior life estate is or is not limited to the separate use of the feme sole? Supposing that property stands limited to trustees only during the life of a feme sole in trust for her, for her separate use, and after her death to the use of such persons as she shall appoint, that is a legal power over the reversion or remainder expectant on her own decease. The limitation of the life estate to her separate use means, that it shall be inde-

1854.

VAUGHAN  
v.  
VANDER-  
STEGEN.


1854.

VAUGHAN  
v.  
VANDER-  
STEGEN.

pendently of any husband with whom she may afterwards intermarry. But the remainder or reversion is limited to the use of such persons as she shall appoint, that is, not limited to her separate use. Suppose she afterwards marries, that does not alter the nature or condition of the reversion or remainder, or make it an estate limited to her separate use; it remains just what it was before the marriage. The life estate is indeed limited to her separate use, and so it was before the marriage; but that does not affect the condition of the remainder or reversion. So, it is the same thing if the remainder or reversion is merely equitable. Suppose the fee is limited to trustees in trust for a feme sole for her life for her separate use, independently of any husband with whom she may afterwards intermarry, and, after her death, in trust for such persons as she shall by deed or will, or by will only, appoint. The life estate stands settled to her separate use; but no one will contend that the reversion is so. As I observed before, it is not settled to her use at all, she has merely a power to appoint it. If she marries, her marriage does not alter the nature or condition either of the life estate or of the reversion; each remains precisely what it was before. The fact of the life estate being already settled to her separate use, cannot make her power over the reversion become, by her marriage, property settled to her separate use.

Now all these observations apply not only to real estate, but the same doctrine applies precisely with regard to personal property. Personal property may be settled to the separate use of a feme sole, that is, with a view of its being independent of any husband with whom she may afterwards intermarry; or it may be simply settled to her use, without any such expression of its being settled to her separate use; or it may be settled to such

uses or purposes as she shall appoint. The life estate may be settled in one of these modes, and the reversion in another. A subsequent marriage does not make a new settlement of it, so as to make that which was not before settled to her separate use, become property settled to her separate use.

1854.  
  
 VAUGHAN  
 v.  
 VANDER-  
 STEGEN.

If, then, a power of appointment vested in a married woman is not property settled to her separate use, where the power was created *before* her marriage, what possible difference can it make if the power be created *after* the marriage? If the father or other relation of a married woman devises property to her for her life, and after her death to such uses as she shall by deed or will appoint, so that the power is a *legal* power, that power is no more property settled to her separate use, than it would have been if the devise had been made before the marriage. The power is nothing but a power; it is not an estate; the reversion is not settled to her separate use; it is not settled to her use at all. And it is precisely the same thing if the power given to the married woman by such a devise is an equitable power. Nor can it make the slightest difference in the nature of the power whether it be created by marriage settlement or by any other instrument. In every case a power of appointment vested in a married woman, however or whenever created, is a power only, and is not an estate or property vested in the donee of the power, and cannot be property settled to her separate use. True it is she may dispose of it without the intervention of her husband, but only by adopting the particular method prescribed by the power. She cannot (as she may do with respect to property settled to her separate use) dispose of it by every or any instrument or mode of conveyance or disposition as freely as a feme sole could do with her own property;

1854.

VAUGHAN  
v.  
VANDER-  
STEGEN.

she is strictly confined to the mode and formalities prescribed by the power. And when she exercises the power in favour of any given individual, she is not giving him her own property, but only nominating him as the person who is to take under the instrument creating the power. And her capacity to exercise the power, independently of her husband, is recognized and maintained by a Court of Equity as well as by a Court of Law, not upon any principle or notion of her being regarded as a feme sole (for if it were so, a Court of Law could not recognize it), but upon the principle that a married woman is held by all Courts, whether of Law or Equity, to be as capable of exercising a power of appointment as a feme sole or a man.

Now, for the reasons I have mentioned, it appears to me that it is a mistake to suppose, that because a married woman having a power of appointment may exercise that power independently of her husband and without his intervention or interference, that therefore the property which is subject to that power is property settled to her separate use. And if it be not settled to her separate use, although in the view of a Court of Equity she is a feme sole in respect of property which is settled to her separate use, and may (as a feme sole might do) contract debts payable out of such property, she cannot contract debts (I mean in the ordinary way, for I shall have to advert to an exception presently)—she cannot in the ordinary way, that is, by her mere contract, incur a debt payable out of property over which she had a mere power of appointment, because she cannot contract a debt payable out of her general assets, or any property not settled to her separate use.

But, notwithstanding the incapacity of a married woman

to incur a debt merely by her contract, yet, it is well established, that a married woman is capable of committing a fraud, and is liable to be visited with the consequences of the commission of such fraud. The case of *Savage v. Foster*, that was cited to me, in the 9th volume of Modern Reports, and several other cases, have clearly established that; and the principle applies, not only to the acts of a married woman who is incapable of affecting herself in the ordinary way by contract, but applies also to the case of an infant. It is not necessary for me to consider the case of an infant. I take the case of a married woman. In the case of *Savage v. Foster*, a married woman was entitled to an estate in fee simple expectant on the death of her mother. Her half-sister was about to be married. The married woman entitled to this remainder or reversion was very anxious to promote that marriage, and, in order to procure the marriage to be brought about, induced her mother to represent herself as the owner in fee of the estate, though she was only tenant for life, the married woman who was entitled in remainder suppressing and concealing the fact of her own title. Accordingly, the marriage of the sister was brought about by the mother conveying, as if she were the owner in fee, the estate to the intended husband. Afterwards, the married woman, who had thus induced her mother to execute this conveyance, became a widow, and, on a bill filed by the husband of the sister, she was compelled by the Court to convey the estate. It was held to be a fraud in her, and the Court made her set right that fraud; that is, visited the effect of that fraud on this property which was her own fee simple estate on the death of the mother.

Several other cases were cited, which it is not necessary to go through, in which the principle is clearly recognized

1854.

VAUGHAN  
v.  
VANDER-  
STEGEN.

1854.  
~  
VAUGHAN  
v.  
VANDER-  
STEGEN.

that a married woman is not only capable of committing a fraud, but that her property is liable to be visited with the consequences of that fraud.

Now I think that that principle applies to the case of *Mr. Gates*. When the case was first before me, this point hardly received any consideration; both the counsel and the Court were so much occupied with the general question, that it hardly received any attention; and, without sufficient consideration on the former occasion, I stated shortly I did not see any thing in *Mr. Gates's* case to distinguish it from those of the other creditors. But a reconsideration of the question brings me to the conclusion that *Mr. Gates* stands in the position of a person who has been defrauded, who has advanced 5,000*l.* under a gross fraud committed on him by the married woman, *Lady Dunboyne*; for the matter stands thus: *Lady Dunboyne*, being the widow of *Mr. Vaughan*, contracted a marriage with *Lord Dunboyne*, which, by the Master's report, is found to have been a valid marriage. For reasons which are not very apparent, and which it is not necessary to enter into, she concealed from every body, among the rest concealed from *Mr. Gates*, the fact that she was married. She represented herself to be still *Mrs. Vaughan*, the widow of *Mr. Vaughan*. She represented herself to be what, if she had been still a widow, she would have been, the owner of, and able to deal with, as a feme sole, certain real estate, which was limited to her in fee, subject to her general power of appointment by will. She borrowed 5,000*l.* of *Mr. Gates*, and executed what purported to be a mortgage to secure to him that sum. She executed that mortgage of course in her name and description of *Mary Ann Vaughan*, widow. After that transaction, and about a year or two after the marriage with *Lord Dunboyne*,

she went through another ceremony of marriage with Lord *Dunboyne*, and that second marriage was avowed and treated as if it were the only marriage; but it has been found by the Master, and that finding is not challenged, that the first marriage was a valid marriage. It was therefore admitted by Mr. *Gates's* counsel that that deed could not prevail as a mortgage. Now, supposing Lady *Dunboyne* had survived Lord *Dunboyne*, could there have been the least doubt but that, as against her, this Court would have given relief to Mr. *Gates*, and given him a charge on that very property which, by having become again a widow, Lady *Dunboyne* was the absolute owner of? I cannot entertain the smallest doubt but that, if, in that state of things, Lady *Dunboyne* having become a second time a widow, on the death of Lord *Dunboyne*, Mr. *Gates* had filed a bill against her, this Court would not only have made her liable to pay the 5,000*l.* back to Mr. *Gates*, but would have given him an equitable charge on that very property which she had thus purported to mortgage to him, not as giving effect to the instrument she had executed as a mortgage, but making it the foundation of creating a charge, which it would have enforced by compelling a legal mortgage. If that would be the case in the event of Lady *Dunboyne's* surviving Lord *Dunboyne*, on which I confess, after fully considering it, I do not entertain the smallest doubt, Lady *Dunboyne* not having become a widow, having died before Lord *Dunboyne*, but having died the owner of this very property which she purported to mortgage to Mr. *Gates*, which property descends to her heir, claiming merely as a volunteer through her, it appears to me, that not only is Mr. *Gates* entitled to stand as a creditor of Lady *Dunboyne* against her assets generally, but that he is entitled to a specific charge in equity on the very property which was purported to be mortgaged to him;

1854.


VAUGHAN  
v.  
VANDER-  
STEGEN.



1854.  
VAUGHAN  
v.  
VANDER-  
STEGEN.

that is, as I should have given this effect to it against Lady *Dunboyne* if she had survived her husband, I ought to give this effect to it as against the heir of Lady *Dunboyne*, who merely claims through her by descent. It appears to me, therefore, that Mr. *Gates* is entitled to be declared to have an equitable charge for his 5,000*l.* as against the real estate which purports to have been made the subject of that mortgage; and if that property should not be sufficient to satisfy his claim, he would be entitled to stand as a creditor on her general assets, and of course, if a creditor on her general assets, then, if the general assets should not be sufficient (about which, however, there is not the least apprehension, I believe), then, as in the case of a feme sole or a man, the appointed property becomes liable to supply any deficiency. If a man or a feme sole had borrowed money, and had died, what would be applicable first? The general assets; and in default of general assets, or failing general assets, or in case of the insufficiency of general assets, then the appointed property would be available. And so, it appears to me, the same principle would prevail here. In short, consistently with the view I take, that property, whether real or personal, limited to the appointment of a married woman, is not her separate estate; consistently with that, if her general assets are liable to pay any obligation of hers, then, if the general assets fail, the property which she has appointed is liable, not because it is limited to her separate use, but because, her general assets being liable, if the assets fail, the property appointed becomes liable, as it would in the case of a feme sole or a man. And this view preserves what appears to me to be the principle and justice of the whole doctrine on which, in any case, you apply property that has been appointed under a power; you cannot apply it until you have exhausted all the general assets of the appointor.

You do not take the property which was never the appointor's at all, and which he has, under a power, appointed to strangers; you never take that property to pay the debt until you have taken his own assets. It may be considered somewhat of a stretch to apply it at all in payment of the debts of the donee of the power, but that doctrine is well established, and the same doctrine applies to the case of a married woman, not because it is property settled to her separate use, but because, as in the case of a man, so in the case of a married woman, on failure of general assets which are liable, then the appointed property is liable also.

1854.  
  
 VAUGHAN  
 v.  
 VANDER-  
 STEGEN.

There is one other case, the case of *Mr. Waugh*. His case stands on a totally different principle from that of *Mr. Gates*, but it stands on a principle, if anything, still more clear; for, as I now understand (which I was not aware of on the first occasion), *Mr. Waugh* was a creditor of *Lady Dunboyne* before her marriage with *Lord Dunboyne*. Now, what is the effect of a single woman owing a debt, and then marrying? So long as the coverture lasts the debt may be recovered from the husband, but as soon as the coverture ceases, whether the coverture ceases by the death of the wife or by the death of the husband, from that moment it ceases to be the debt of the husband and remains as it was before, the debt of the wife, payable of course out of her general assets. Suppose that *Lady Dunboyne* had survived her husband, that debt of *Mr. Waugh*, which was her debt before her marriage, would be a debt recoverable personally from her. If it was a debt recoverable by an action at law before the marriage, when the marriage ceased it would be recoverable against her by an action, and recoverable at her death against her executors, and in the administration of her assets *Mr. Waugh* would be entitled to be admitted

1854.  
 VAUGHAN  
 v.  
 VANDER-  
 STEGEN.

as a creditor. Mr. *Waugh*, therefore, stands in the situation of a creditor of Lady *Dunboyne*, not by virtue of a debt that she contracted during the coverture, but a debt that she contracted before her coverture, and which remains a debt on the *cesser* of her coverture. Mr. *Waugh's* debt is payable out of her general assets; and, as in the ordinary case of a man or a feme sole, if the general assets are not sufficient to pay Mr. *Waugh's* debt, then the appointed property will come in aid when you have exhausted all the general assets. The general assets will therefore be applicable in the usual order. First of all, her separate estate, which I understand is very small, perhaps almost nothing. Then will be applicable her general assets in the usual order of priority, that is, her personal estate first. If there were any *choses in action*, which her husband had not recovered which remain her personal estate, or any leasehold estates which remain her personal estate which the husband had not made his own, whatever personal estate there was, that will be liable. Then will come her general real estate which she has not appointed. If those are insufficient, then the appointed property will come in aid. If I am not mistaken about the property, there will be no necessity to come on the appointed property, there will be enough without; but I am stating what I conceive to be the principle on which the debts would be payable.

I will now state my view with respect to the two cases which were cited, and which I have not yet adverted to, viz. *Stead v. Clay* and *Shipton v. Rawlins*.

I would first, however, observe, that if a woman before her marriage is an executrix or an administratrix, or a trustee, having trusts to execute or having assets to administer, if she afterwards marries, and a *devastavit* or

a breach of trust is committed during coverture, the husband is, *primâ facie*, liable for that *devastavit*; for it is assumed, in the absence of anything shown to the contrary, that he was a party to that *devastavit*; he is liable for it. When the coverture ceases, supposing the wife should survive the husband, *primâ facie* the liability of the husband ceases, unless he was himself actually a party to the *devastavit*. But if the husband was no party to the *devastavit*, the wife's liability remains after the *cesser* of the coverture; and in the case of *Adair v. Shaw*, a well-known case in *Schoales* and *Lefroy*, Lord *Redesdale* went so far as to determine this, that after the coverture the wife was liable for the *devastavit*, even though committed by her husband during the coverture. But in *Clough v. Dixon*, the late Vice-Chancellor of *England* expressed some doubt whether Lord *Redesdale's* reasoning was satisfactory, and whether the wife after the cessation of the coverture ought to be liable for a *devastavit* which was not her act, but the act of her husband. But nobody ever doubted that if the wife committed the *devastavit* she would be liable after the coverture ceased. Whether the husband would be liable or not is not material; the wife would be liable. And so if the coverture ceases, not by the death of the husband but by the death of the wife, the wife's property would be liable. I mention this for the purpose of explaining the grounds on which I consider *Shipton v. Rawlins* to stand.

Now *Stead v. Clay* was cited as an authority contradicting the general proposition, that a married woman cannot, by her contract, incur an ordinary debt during her coverture, payable out of property over which she has a mere power of appointment. Now, in that case, the husband of the married woman, a person of the name of *Liddard*, had become a bankrupt, and being a bankrupt

1854.  
  
 VAUGHAN  
 v.  
 VANDER-  
 STEGEN.

1854.  
  
 VAUGHAN  
 v.  
 VANDER-  
 STEGEN.

he had withdrawn his furniture and some other property from the creditors, sold it, transferred the proceeds to *Rothschild's* house at Paris, and caused the money to be invested in *French* rentes. He had afterwards transferred the rentes into the name of his wife, and he and his wife had gone to *Paris* and resided there. It appears, that under a settlement which had been made by the father of the said wife, a sum of 1,500*l.* consols stood limited, so that after a life estate in Mrs. *Liddard* she had a power of appointment over that 1,500*l.* by deed or will; and in default of appointment it was limited to Mrs. *Liddard*, her executors and administrators. Besides that property, there were some long annuities, 59*l.* a year and 1,000*l.* reduced stock, which, under the marriage settlement of Mr. and Mrs. *Liddard*, were also limited in reversion to the appointment of Mrs. *Liddard*. Mrs. *Liddard* made a will, by which, as it was alleged, she had exercised her power as to the latter property, but had not exercised her power as to the 1,500*l.* consols, under the father's settlement. If she had not exercised the power, as it was alleged she had not, the property became hers; if the husband survived her it became his by his marital right; but as he was an uncertificated bankrupt, it vested in the assignee for the benefit of the creditors. The bill was filed by the assignee of the husband against *Susannah Clay* and other persons claiming under the wife's will, alleging that there was an appointment executed as to the funds under the marriage settlement, that is, the 1,000*l.* reduced and the long annuities, but no appointment of the 1,500*l.* consols; and the claim made by the bill was this, that the 1,500*l.* consols belonged to the assignee in right of the bankrupt, who was entitled to it in right of his wife, as in default of appointment. The case came before Sir *Anthony Hart*, upon a motion to restrain *Susannah Clay*, who was appointed executrix

under the wife's will, to restrain her from taking these funds over to *France* and disposing of them. Sir *Anthony Hart* took this view. He restrained the transfer of the 1,500*l.* stock, because, according to the representations, that actually belonged to the assignee of the bankrupt; but he refused even the interim injunction as to that which was appointed. Now, stopping there, what does that show? It shows, in the broadest possible way, that in the view of a most eminent and experienced judge, one thoroughly versed in the principles of equity, a married woman cannot by any act of her own, during the coverture, contract a debt affecting the property over which she has a mere power of appointment, and that there is no ground for the notion of its being settled to her separate use, because if it was, of course it would be liable to her obligations and debts.

As far as I can make out, upon examining the record and the amendments made, the case as presented to Sir *Anthony Hart* differed from what was presented afterwards to Lord *Lyndhurst* on appeal. He either had not had it presented to him, as it turned out to be when it came before Lord *Lyndhurst*, or he did not sufficiently consider that it was not the case of a married woman incurring a debt by her mere contract, but the case of a married woman who was a party to a fraud. The case came before Lord *Lyndhurst*; and then it appeared that Mrs. *Liddard* had in fact appointed both the 1,500*l.* under the one settlement, and the other funds under the other settlement. Sir *Anthony Hart*, if he had known that she had appointed both, would doubtless have refused the injunction as to all. Lord *Lyndhurst* granted the injunction as to all. Why? Lord *Lyndhurst* does not, in his judgment, allude to the question as to the capacity of a married woman to contract debts, nor to the question,

1854.


VAUGHAN  
v.  
VANDER-  
STEGEN.

1854.  
 VAUGHAN  
 v.  
 VANDER-  
 STEGEN.

whether property over which she has a power of appointment is property settled to her separate use ; but merely says that there is good reason to suppose that the *French* rentes which had been transferred to the wife, and which she had transferred to her sister, were the bankrupt's property, that is, the property of the bankrupt's creditors, the abstraction of which was a fraud, to which fraud the wife was a party ; and therefore, without deciding any right, he would not allow the property to be taken away by the appointee of the wife till the questions as to the rights of the parties should be decided on the hearing of the cause. Now that case does not, in the smallest degree, establish the proposition, that property which is liable to a married woman's appointment under a power is property settled to her separate use ; nor the proposition, that such property is liable to pay any debts which she may have purported to have contracted or incurred by her mere contract, during the coverture.

Now take the case of *Shipton v. Rawlins*. That case, as ultimately decided by Sir *John Stuart*, is not reported, I believe, anywhere ; but it is reported, on an interlocutory application, in the 4th *Hare*. In that case, a widow, under her first husband's will, was entitled for her life to the income of certain leasehold property held under a renewable lease from an ecclesiastical body, and which, subject to her life interest, was bequeathed to certain persons. The widow had also a power of appointment over the reversion of his residuary property. She was one of the trustees and executors under his will, and a trust was imposed upon the life interest which she had in the leasehold property, to set apart a certain sum annually, in order to provide a fund to pay for the fines or renewals of the leases of this property. The widow married a second husband, and upon that marriage she

settled her life interest in trust for herself, for her separate use. She still remained, of course, a trustee, and was, in fact, the acting trustee and executrix under the will. She did not set apart the renewal fund, but she received the whole life interest; and as it was limited by her second marriage settlement to her separate use, she had the whole benefit of it. It was not the husband's *devastavit*, because the life interest out of which the renewal fund ought to have provided did not go to him, but by the very terms of the settlement that life interest was settled to her separate use; so that she, apart from her husband, and as a feme sole, had, during the marriage, committed the breach of trust by receiving and applying the whole of the life income, instead of setting apart a sufficient sum to answer the renewals. She died, and after her death the persons who were entitled in reversion to the ecclesiastical property under the first husband's will filed their bill against the trustees to make them responsible; but they insisted that the representatives of the wife, who was the acting trustee, and had received and applied to her own separate use the whole income out of which the renewal fund should have been provided, were necessary parties; and Vice-Chancellor *Wigram* allowed the objection, and required the representatives of the wife to be brought before the Court; and when the representatives were brought before the Court, Sir *John Stuart*, as I conceive, most properly, held, that her property was liable, and of course the property over which she had a power of appointment was liable, because her general assets were liable. I have not the advantage of having any copy of the judgment delivered by Sir *John Stuart*, and therefore I cannot say what the precise ground was on which he put it. If he put it on the ground that the reversion was settled to her separate use because she had a power of appointment

1854.  
  
 VAUGHAN  
 v.  
 VANDER-  
 STEGEN.



1854.

VAUGHAN  
v.  
VANDER-  
STEGEN.

over it, I should take the liberty of entirely disagreeing with him, for the reasons I have mentioned; but I have no reason to suppose he put it on that footing. I take for granted that he put it on the footing that this was not a debt created by a mere contract entered into by her during her marriage, but a debt or liability created by the breach and violation of an obligation and duty imposed upon her before her marriage, and which continued during her marriage, of which breach of duty she herself, exclusively of her husband, derived the benefit; and that for a debt or liability so incurred, her general assets were liable; and if her general assets, then failing those general assets, the property over which she had a power of appointment was liable, she having exercised the power.

These two cases upon which I have now commented are the only two cases which have been cited in support of the proposition that property, which is the subject of a power of appointment in a married woman, is property settled to her separate use, or is liable, without the general assets being liable, to pay any debt, or so called debt, which the married woman has incurred, or purported to incur, during her coverture, simply by her contract.

I have now stated the grounds on which I entirely adhere to the view I before took on the general question, and also have explained the grounds on which I consider that Mr. *Gates*, for the reasons I have mentioned applicable to him, and Mr. *Waugh*, for the reasons I have mentioned applicable to him, stand in a totally different situation from persons who claim to be creditors for what is called a debt, incurred by the mere contract of a married woman, a married woman being incapable of contract, except to the extent of her separate estate.

1854:  
3rd July.

Vendor and  
Purchaser.  
Specific  
Performance.  
Condition.

TAYLOR v. GILBERTSON.

**THIS** was a special case, the material statements of which were as follows:—

1. On the 11th day of November, 1853, the Plaintiff and the Defendant entered into and signed an agreement in writing in the words and figures following, viz.:—  
“An agreement made and entered into this 11th day of November, 1853, between *Andrew Taylor*, Esquire, and *James Matthias Gilbertson*, Esquire. The said *Andrew Taylor* agrees to sell, and the said *James Matthias Gilbertson* agrees to purchase, all that twenty-one acres of freehold and tythe free land, which land is subject to 2*l.* per annum land tax, together with the house or lodge fixtures, furniture, assets, implements, materials at stables, and coach-houses, together with the said stables (the linen alone excepted), at the sum of 5,000*l.*, Mr. *Taylor* to make out a clear and marketable title for the same, and the purchase to be completed forthwith. And it is hereby further acknowledged that the said *James Matthias Gilbertson* has paid the sum of 50*l.* as a deposit upon the said purchase, the above property being *Fullwood Park, Cheltenham, Gloucestershire.*”

Land was sold by the mortgagees of *B.*, consisting of a circular plot, surrounded by a ring called the Park Drive. It was stipulated that if used for building, villas of a certain size were to be built; that the ground between the villas and the Park Drive should be laid out in lawn or pleasure grounds down to the Park Drive; that a footpath of the width of fifteen feet should be laid out round the whole of the northern, southern and western bound-

daries of the said land. The Park Drive round the circular piece belonged to *B.*; the part outside had originally been his, but, with a small exception, had been sold by him.

Held, that the condition about the footpath was too vague to be enforced, and that the purchaser was not bound to make it, and could not be restrained from using the land in any way inconsistent with making it.

1854.  
TAYLOR  
v.  
GILBERTSON.

2. An abstract of the title of the Plaintiff to the property had been delivered to the Defendant's solicitor, but an objection had been taken on behalf of the Defendant to the Plaintiff's title, under the following circumstances.

3. Previously to and at the time of the date and execution of the indenture (dated the 25th day of October, 1838) hereinafter stated, *Thomas Billings*, of *Cheltenham*, was well entitled to the fee simple of the plot or parcel of land which by the hereinbefore-stated agreement is contracted to be sold, subject to a mortgage in fee of part thereof to the Rev. *John Lewis Bythessa*, Clerk, in whom the legal estate of such part was then vested.

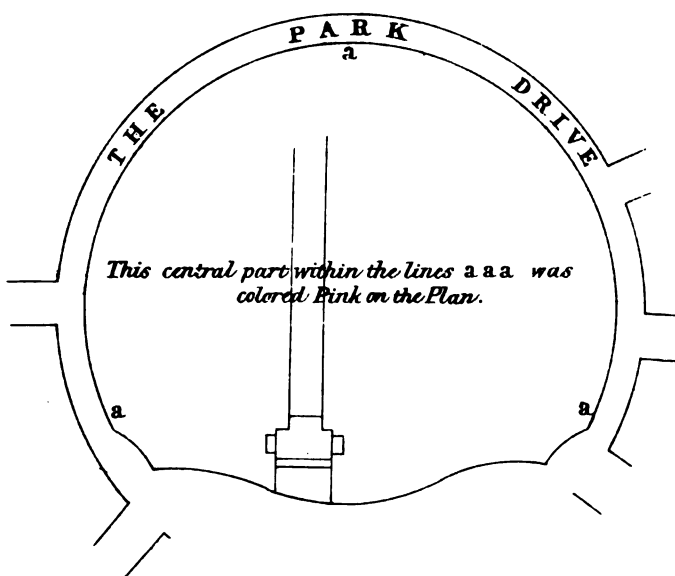
4. The said plot or parcel of land is delineated on a certain map or plan marked A (which is to be taken and considered as part of this case), and is therein coloured pink.

5. The said *Thomas Billings* was also, at the date of the said indenture, entitled in fee simple to the land which is described in the said plan as the Park Drive, and coloured brown, and also to other land on the opposite side of the said Park Drive, and which other land is coloured green on the said map or plan.

6. At the date of the said indenture the said plot or parcel of land coloured pink was used as Zoological, Botanical and Horticultural Gardens.

7. By indenture dated the 25th day of October, 1838, and made between the said *Thomas Billings* of the first part, the said *John Lewis Bythessa* of the second part,

**PLAN A,**  
Referred to in Statement N<sup>o</sup> 4.





*Pearson Thompson, Henry Norwood Tyre and John Baron*, of the third part, and *John Henry Howard, Digby Latimer and John Henry Bolton*, of the fourth part, the said plot or parcel of land was conveyed by the said *Thomas Billings* and *John Lewis Bythesea* unto and to the use of the said *John Henry Howard, Digby Latimer and John Henry Bolton*, their heirs and assigns, for ever, freed and discharged from the said mortgage to the said *John Lewis Bythesea*, but subject to a proviso for redemption of the same premises on payment by *Billings*, his heirs, &c., to *John Henry Howard, Digby Latimer and John Henry Bolton*, their executors, &c., of 5,000*l.* and interest. And if default should be made in payment, then, on six calendar months notice, there was a power to *Howard, Latimer and Bolton*, their executors, administrators or assigns, to sell the said hereditaments and premises, or any part or parts thereof respectively, with their and every, &c. (the usual terms of a mortgage power of sale). And it was thereby also provided, that if at any time or times thereafter, and when and so soon as the said *John Henry Howard, Digby Latimer and John Henry Bolton*, their heirs, executors, administrators or assigns, and every other person or persons whomsoever claiming or to claim by, from, through, under or in trust for them, any or either of them should, under or by virtue of any power or authority therein contained, enter into or upon or become possessed of the plot, piece of land or ground, hereditaments and premises therein particularly mentioned, or any part thereof, the same should be held by them respectively, so long as the same should be used for the purpose of Zoological, Botanical and Horticultural Gardens, subject to all and singular the restrictions, stipulations and conditions to which the same would and ought

1854.

W  
TAYLOR  
v.  
GILBERTSON.



then paid, they the said *John Henry Howard, Digby Latimer* and *John Henry Bolton* granted, bargained, sold, released and conveyed unto the Plaintiff, his heirs and assigns, all the said land, hereditaments and premises comprised in the said indenture of the 25th day of October, 1838, with their appurtenances, subject nevertheless to the legal obligations (if any) to observe the several hereinbefore recited conditions, restrictions and stipulations relating to the enjoyment of the same premises, to hold the same unto the said Plaintiff, his heirs and assigns for ever, to such uses and upon such trusts and in such manner as the Plaintiff should appoint, and in default of appointment, to the use of the Plaintiff and his assigns for life, with a limitation to the use of the said *John Henry Howard*, his executors, administrators and assigns, during the life of and in trust for the Plaintiff, with remainder to the use of the Plaintiff, his heirs and assigns for ever.

1854.  
  
 TAYLOR  
 v.  
 GILBERTSON.

13. At the interval between the date and execution of the said conveyance to the Plaintiff of the 6th August, 1847, the said *Thomas Billings* had sold and conveyed away the said Park Drive, and all his property coloured green thereto adjoining, except the parcels of land marked Nos. 12 and 13 on the plan; and in the same interval he had mortgaged the said Nos. 12 and 13 in fee. The mortgagee has since absolutely sold No. 13, but the said *Thomas Billings* is still entitled to the equity of redemption of No. 12. The said sales and mortgage were made without any stipulation or agreement that the purchasers or mortgagees should be entitled to the benefit of the aforesaid conditions or restrictions respecting the enjoyment of the said plot of land coloured pink.

14. The Defendant objects to the Plaintiff's title upon



1854.  
~  
TAYLOR  
v.  
GILBERTSON.

the following grounds; 1st. That a purchaser from the Plaintiff of the plot or parcel of land agreed to be sold will be liable to be compelled to observe the aforesaid conditions, and to lay out or cause to be laid out a footpath of the width of fifteen feet round the whole of the northern, southern and western boundaries of the said plot or parcel of land; and 2ndly. That a purchaser from the Plaintiff of the said plot or parcel of land will be liable to be restrained from using or disposing of the same in a manner inconsistent with the construction of such footpath as aforesaid.

The questions for the opinion of the Court are as follows:—

1st. Whether a purchaser from the Plaintiff of the said plot or parcel of land coloured pink on the said map or plan marked A will be liable to be compelled to lay out, or cause to be laid out, a footpath of the width of fifteen feet round the whole of the northern, southern and western boundaries of the said plot or parcel of land?

2ndly. Whether a purchaser from the Plaintiff of the said plot or parcel of land will be liable to be restrained from using or disposing of the same in a manner inconsistent with the construction of such footpath as aforesaid?

The clause respecting the laying out of the land in building, of which part was the condition requiring the making of a footpath, was as follows:—

“ Provided always, that if any time or times hereafter, and when and as soon as the said *John Henry Howard*, *Digby Latimer* and *John Henry Bolton*, their heirs,

executors, administrators or assigns, and every person or persons whomsoever claiming or to claim by, from, through, under or in trust for them, or any or either of them, should, under or by virtue of any power or authority herein contained, enter into or upon, or otherwise become owners of the plot, piece or parcel of land or ground, hereditaments and premises hereinbefore particularly mentioned, or any part thereof, the same shall be had and held by them respectively so long as the same shall be used for the purpose of Zoological, Botanical and Horticultural Gardens, subject to all and singular the restrictions, stipulations and conditions to which the same would and ought to be had and held under or by virtue of the said herein in part recited articles of agreement of the 1st February, 1837, and deed of arrangement of the 21st of the same month of February respectively; but after the same shall have been discontinued to be used as Zoological, Botanical and Horticultural Gardens, and shall be sold or demised by the said *John Henry Howard, Digby Latimer and John Henry Bolton*, their heirs, executors, administrators or assigns, pursuant to the powers and authorities in the now abstracted indenture, the same shall be sold or demised, subject to the conditions, restrictions, and stipulations following, namely:—That all and every messuages to be erected on the land should be detached villas, to front towards but set back one hundred feet from the said Park Drive, and that each such messuage or villa should have at least one acre of land, including the site thereof, to be held therewith, and only one messuage or villa should be of the value of 1,500*l.*, exclusive of the said land so to belong thereto, and should be of stone fronts or covered with Roman cement, and the roof thereof covered with blue slates, lead or zinc. That the land between the front of such villa and the said Park

1854.

TAYLOR

v.

GILBERTSON.

1854.

TAYLOR

v.

GILBERTSON.

Drive should be laid out and for ever thereafter preserved as lawns or pleasure grounds, and that any and every stable or coach-house and outbuildings so to be built on the said land should be built behind the villa and messuages to which the same shall respectively belong. That no trade or business of any kind, manufactory, mews, livery stables, or inn, beer-house or business of a similar nature shall ever be carried on the said land, messuages or villas, or any part thereof; and that no bricks, tiles, pipes, pottery or lime shall be made or burnt thereon; and that no act, deed or thing shall be done or permitted thereon or therein which can be a nuisance or annoyance to the neighbourhood. And also, that a footpath of the width of fifteen feet shall be laid out round the whole of the northern, southern and western boundaries of the said land."

Mr. *Baily* and Mr. *Shebbeare* for the Plaintiff, the vendor.

If the path is to be made at all, it is clear that it must be outside the boundary. But the condition is so vague, that there can be no obligation on any one to make it at all.

It is expressly stipulated that the gardens of the houses are to abut against the Park Drive. Therefore, it is impossible that the path can be made except outside of the Park Drive.

But all the land outside the Park Drive is in the possession of strangers. How is it possible that any purchaser can be under an obligation to make a path on land which he has not bought, and over which he has no control? We say, then, the condition is so indefinite, that no construction can be put upon it, and a purchaser

could not be compelled to do any thing. The path cannot be laid out *within* the Park Drive, that is clear. If made at all, it must be made on the part marked brown or green; and with all his interest in that, *Billings* has parted without giving to his purchasers any right to have the path made. There is nobody interested in having the path made; and it is to be observed that here there is no covenant: so that it cannot be argued on the ground of a covenant running with the land. Next, suppose a path is to be made, *who* is to make it? Is it the mortgagees? If they had foreclosed, must they have made it? Clearly not. There is nothing in the mortgage deed to compel *them* to make the path. If they had sold simply, having foreclosed, their purchasers would not have been subject to the condition. Can it then be the intention that purchasers under the *power of sale* shall be bound, when purchasers under the mortgagees, if they had become owners, would not? *Tulk v. Moxhay* (a) will be cited; but there the contract was clear. So in *Coles v. Sims* (b), there was a clear contract.

1854.  
  
 TAYLOR  
 v.  
 GILBERTSON.


Mr. *Glasse* and Mr. *Baggallay* for the Defendant, the purchaser.

The question is, is there any body who may at any time file a bill to restrain the purchasers from doing any thing *inconsistent* with this condition?

This is exactly like the case of *Tulk v. Moxhay*; the purchaser takes with notice, and an injunction would be granted. It is immaterial whether the condition is equivalent to a covenant running with the land; we have notice of it, and should be bound, whether it is a covenant or a mere condition of sale. They cited also *Moxhay v. Inderwich* (c). Then it is said, that as to some

(a) 11 Beav. 571; 2 Phill. 774. (b) 1 Kay, 56.

(c) 1 De G. & Sm. 708.

1854.  
  
 TAYLOR  
 v.  
 GILBERTSON.

portions of the land that *Billings* had, he has since sold them. But that has nothing to do with the case. We buy, with notice that he reserved a right. It is no answer to say that difficulties may be thrown in the way of specific performance of the contract by the acts of *Billings*. There may be more or less difficulty; but the question is, are we clearly free from a suit to restrain us from doing anything inconsistent with the right reserved by *Billings* or any part of it. The argument on the other side is that the contract is too vague. It is not so. The true construction of the condition is, that the path is to be made on the land purchased; and there is nothing in the clause about laying out the grounds inconsistent with the construction of a path round them; such a path for the use of the occupiers of all the houses would be consistent with that clause. But if the path is to be on the property the purchaser has not purchased, *à fortiori*, it is an onerous condition; it is one not merely detracting from the value of his purchase, but one he may find it impossible to comply with. *Billings*, or any person claiming under him, would be clearly entitled to avail himself of the condition.

Mr. *Baily*, in reply.

I do not dispute that there might be an injunction if the condition is capable of performance. The question is, is there such a condition? Is there not so much doubt about the construction of the condition as to prevent the Court from granting an injunction? How can it be contended that the intention could be that fifteen feet should be cut out of the ornamental grounds and plantations? That would not be carrying the lawn and pleasure grounds down to the Drive, which clearly is the stipulation. In truth, the condition for making a path is contradictory of the building stipulation, if it is to be

said that the path is to be on the part coloured pink, and impossible if it is to be outside, because the path could only be then made on land over which neither *Billings* nor the purchaser have any control. It is therefore void, and the purchaser cannot be damnified.

1854.  
TAYLOR  
v.  
GILBERTSON.

The VICE-CHANCELLOR:

The question in this case is, whether certain restrictions on the power of sale in a mortgage deed prevent the vendor in this case from being able to give the purchaser a complete title? [His Honor then stated the facts.] The question is, whether the purchaser from the Plaintiff, of the ground coloured pink, will be liable to be compelled to lay out, or cause to be laid out, the path referred to; or whether he will be liable to be restrained from doing anything inconsistent with making the path; in other words, is there anybody who could by bill, or by any other proceeding, compel the making of the footpath, or restrain the purchaser from using the ground in any manner inconsistent with making it? The plan which is annexed to this case and made part of it is a material ingredient in the consideration of the question. The fee simple of the part called the Park Drive was vested in *Billings*, and so was the part outside the Park Drive; but with the exception of one plot which he has mortgaged, but of which he retains the equity of redemption, he has sold all the rest. He has still, however, an interest in that one plot. Now, with regard to the stipulation in question, it appears to me doubtful and uncertain what it meant; where the path is to be made, whether it is to be made in the inner part of the land, the land subject to the mortgage, or whether it is to be made in the Park Drive. I confess I should have inferred that the parties intended it should be in the Park

13th July.  
Judgment.

1854.

TAYLOR

v.

GILBERTSON.

Drive. But then there is this difficulty, that the soil on which the path would have to be made, did not and was not intended to belong to the purchaser, but remained in *Billings*. Now the stipulation could not have meant that *Billings* should have to make the path; it is plain, from the language of the stipulation, that it was imposed by way of obligation on the purchaser. At the same time I do not see how the purchaser could be intended by the stipulation to make a path on ground on which he had no right even to enter to make it. Further, I do not see how it could be of advantage to anybody, to any owner of land either outside the Park Drive, or in the Park Drive, or within the circle, to have the path made. It is clear that the fee simple of the land within the circle, that coloured pink, was to belong to the purchaser; and the stipulation was, that the whole of the ground was to be laid out in lawns or pleasure grounds. Now of what use could it be to any one that a path should go round those pleasure grounds, unless there was to be a right of way through it? and it is impossible to say that the stipulation included a right of way for *Billings* or any one claiming through him. Now suppose *Billings* were to file a bill; I do not see anybody but *Billings* who could do so; he, in selling his land outside the Park Drive, gave the purchasers no rights; at any rate they could have no better right than his. Suppose then *Billings* to file a bill to restrain the purchaser from doing anything inconsistent with making a footpath, I do not see how he could allege any mischief done to him. My impression is, that some notion of this sort was in the minds of the parties; it was expected, that, after the land ceased to be used as Zoological or Horticultural Gardens, it would probably be laid out in plots for villas; and it may have been considered desirable to provide the purchasers of those lots with a footpath on their

side of the Park Drive. The notion was, I think, to provide it for the benefit of the owners of the villas.

1854.  
TAYLOR  
v.  
GILBERTSON.

But it appears to me that if *Billings* were to file a bill he could obtain no relief. There is so much uncertainty in the stipulation about the place where the footpath is to be made, or for what purpose, or for whose use it is to be made, that I think if *Billings* filed a bill he could obtain no relief of any kind; therefore the stipulation is no difficulty in the way of the purchaser having a clear title, discharged of any obligation to make the footpath.

Both the questions in the case are therefore answered in the negative.

1854:  
10th & 11th  
July.

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TRACEY v. LAWRENCE.

*Mortgagor and  
Mortgagee.  
Power of Sale.*

**THIS** was a motion for decree on a bill for specific performance.

In a mortgage power of sale it was required that notice should be given to the mortgagor, his heirs or assigns.

The bill stated that *David Lewis*, of *Llandilo*, being seised in fee simple of a freehold estate in the county of *Radnor*, called *Cwm*, otherwise *Cwmpella*, by an indenture dated the 13th day of January, 1843, and made between the said *David Lewis* of the one part, and the Plaintiff of the other part, and which was duly executed by the said *David Lewis*, mortgaged for the sum of 500*l.* to the Plaintiff the said estate, to hold the same unto and to the use of the Plaintiff, his heirs and assigns for ever. The deed contained a power of sale in the following terms, that if payment was not duly made, then it should be lawful for the Plaintiff, his heirs and assigns, after giving six calendar months notice as thereafter men-

The mortgagor died, leaving an infant heir.

Held, that notice to the infant heir and her guardian was good notice.



1854.

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TRACEY

v.

LAWRENCE.

tioned, without any further concurrence of the said *David Lewis*, his heirs or assigns, to enter into possession of the said hereditaments thereby released, and whether in or out of possession of the same, to make any leases thereof, as he or they should think fit; and also, of his and their own authority, to make sale and absolutely dispose of and convey the said hereditaments thereby released, with their appurtenances, for as much money as could be reasonably obtained for the same, and to convey and assure the same when so sold unto the purchaser or purchasers thereof, his, her or their heirs and assigns: and it was by the same indenture declared, that the receipts of the Plaintiff, his heirs and assigns, for the said purchase-money, rents and profits, should be good discharges for the same, and that the persons taking the same should not be required to see to the application nor be answerable for the misapplication of any monies so paid: and the Plaintiff did thereby for himself, his heirs, executors and administrators, covenant, promise and agree to and with the said *David Lewis*, his heirs, executors, administrators and assigns, that no sale or advertisement of sale of the said hereditaments should be made or given, or any lease made, or any means taken for obtaining possession of the said hereditaments, until he or they should have given unto the said *David Lewis*, his heirs or assigns, or have left at his or their last or most usual place of abode in *England*, six calendar months notice in writing demanding payment of the principal and interest monies which, at the end of that time, should be due, and the said *David Lewis*, his executors, administrators and assigns, should have made default in payment of the same at that time.

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There was a further charge of 299*l*.

*David Lewis* died on the 28th of June, 1844, leaving *Jane Lewis*, his daughter and only child and heiress at law, him surviving.

1854.  
TRACEY  
v.  
LAWRENCE.

*Jane Lewis*, at the date of the notice after stated, was an infant of the age of eleven years or thereabouts.

By an order of the Court of Chancery, dated the 26th day of April, 1850, the Reverend *Ebenezer Morris*, of *Llanelly* vicarage, in the county of *Caermarthen*, clerk, was duly appointed guardian of the estate of the infant, *Jane Lewis*.

The bill then stated that the aggregate mortgage debt of 799*l.* being still due to the Plaintiff, the Plaintiff, on the 9th day of July, 1851, served on the infant and on her said guardian a notice in writing under the hand of the said Plaintiff, demanding payment of the said mortgage debt of 799*l.* and interest, at the expiration of six calendar months from the date of the said notice, and threatening to proceed to a sale of the said estate at the end of the said six calendar months, in case default should be made in payment of the said mortgage debt and interest at that time.

The question was, whether the notice to the guardian of the infant heiress of the mortgagor was sufficient?

Mr. *Dart*, for the Plaintiff.

The covenant, I admit, would bind the purchaser, unless the notice was sufficient; but I contend that it was. These powers of sale are now looked at with favour. The heiress of the mortgagor has only a derivative right, and cannot have any greater claim than her ancestor.

1854.  
  
 TRACEY  
 v.  
 LAWRENCE.

The clause is, that *notice in writing* should be given or left—it must be construed most strongly against the mortgagor. He cited *Robertson v. Lockie* (a); *Major v. Ward* (b).

It is sufficient to give the notice to the person designated in the power. It is quite immaterial that that person is an infant; it could not be the intention of the parties that an infancy in the person representing the mortgagor, should prevent the mortgagee not only from selling, but from letting, or even from taking possession; for to that length must it be carried.

Mr. *Hughes*, for the Petitioner.

The proviso about notice is insufficient—it does not contain any stipulation that it shall be effective, although the mortgagor is under disability. And, according to the usual practice of conveyancers, such provisos are so framed, if they are intended to have that effect. He cited *Curling v. Shuttleworth* (c); *Wilkinson v. Hartley* (d).

Mr. *Dart*, in reply.

The power of sale may not be in the most approved form, but that is not the question: the question is, what it meant; whether it was meant by both parties that infancy should make a sale, or a lease, or even taking possession, impossible.

The VICE-CHANCELLOR:

*Judgment.*

The question in this case is, whether the Plaintiff, who is the vendor, had sufficient authority to sell the premises

(a) 15 Sim. 285.

(b) 5 Hare, 598.

(c) 6 Bing. 121.

(d) 15 Beav. 188.

of which he is mortgagee in fee, with a power of sale, the bill being for specific performance of a contract by the Defendant to purchase the property? When this case was argued before me yesterday, I was led by the able argument of Mr. *Hughes* to this doubt,—whether there is such a reasonable doubt on the subject as to induce me to say, that the Defendant ought not to be compelled to perform the contract; I therefore postponed my decision. The result of further consideration is, that I do not think there is sufficient doubt for me to say that the Defendant cannot be compelled to take the title. [His Honor then stated the facts, and referred to the power of sale and proviso.] Mr. *Lewis* died in 1844, leaving his daughter, his heiress, an infant; and a person named *Morris* was appointed guardian of her estate. Now, assuming that the allegation in the bill, as to the notice being served, is proved, I think that the notice that was given to the mortgagor's infant heiress was a good notice in law and in equity. It is to be observed, that the notice is required not only to entitle the mortgagee to sell, but to entitle him to take any step for obtaining possession, &c. Now it never could have been the intention of the parties that the mortgagee should not be entitled to the possession, or even to lease, because the person representing the mortgagor should happen to be under the disability of infancy. If in this case there had been in the proviso a specification of the particular case of disability, and it had said, that the notice should be good notwithstanding the infancy of the mortgagor, there could of course be no question; but though that is not stated, still I think that is the effect; and that notice being requisite to the mortgagor or his heirs, the requisition is satisfied by the notice which has been given; the condition on which the mortgagee is entitled to sell has been performed, and the sale is valid.

1854.

TRACEY  
v.  
LAWRENCE.

1854.

TRACEY

v.

LAWRENCE.

The decree will therefore be for specific performance, if it is proved that the alleged notice was given.

[The proof did not appear to be sufficient, and the case being on motion for decree, stood over to hear further evidence.]

1854:  
19th July.Assets of  
Married  
Woman.  
Powers.

## VAUGHAN v. VANDERSTEGEN.

A married woman having a life estate to her separate use in certain leasehold and personal property, with a general power of appointment by will only, appointed to children.

Held, that in the administration of her estate, a tradesman supplying her with goods while she concealed her marriage, and dealt with him as a single woman, had a claim to be paid out of the appointed fund.

IN this cause (a) certain other claims were made against the property appointed by Lady *Dunboyne*, involving material questions.

*Othwaite's Case.*

The first was by a person named *Othwaite*, a tradesman, who had furnished Lady *Dunboyne* with goods after her first marriage with Lord *Dunboyne*, while she held herself out to be a widow. He did not know of the marriage. He received some payments from the trustee of her first marriage settlement, and did not make any inquiry whether she was married or not. He swore that he believed her to be a widow.

The question was, whether this case came within *Gates'* case (b); and whether the fund appointed by Lady *Dunboyne* was liable to pay the debt to Mr. *Othwaite* remaining unpaid?

Mr. *Dickenson*, for *Othwaite*, contended that it did; that the debt was incurred by fraud; that *Othwaite* was not bound to make any inquiry; and as he swore he did

(a) Reported ante, pp. 165, 289 and 363. (b) Ante, p. 363.

not know of the marriage, and Lady *Dunboyne* had in fact held herself out as unmarried, *Othwaite* was justified in taking her to be so.

Mr. *Greene*, contra.

Mr. *Othwaite* made no inquiries; it was his own default, his own carelessness that he dealt with Lady *Dunboyne* as a widow. He received payment from Lady *Dunboyne's* trustee; that was enough to put him on inquiring whether Lady *Dunboyne* was married or not.

Mr. *Faber*, in the same interest.

This is not like *Gates'* case. In *Gates'* case it was clear that he made his mortgage, on the face of it, on the credit of his dealing being with a single woman. If she had been married, he must of necessity have taken a very different security; a fine would have been necessary.

The VICE-CHANCELLOR:

This falls within the principle of *Gates'* case. The transaction was not so solemn, the misrepresentation not of so formal a character, as in that case. But still there was a substantial misrepresentation by Lady *Dunboyne*. The tradesman supplied her with goods, being *bonâ fide* ignorant of the marriage which she herself concealed: whether she concealed it for the purpose of defrauding him, of which there is no evidence, or for family or any other reasons, is immaterial. She did conceal it, and he fully believed her to be unmarried. He is entitled to claim, to the same extent as in *Gates'* case, for the goods supplied during the concealment of the marriage.

*Annesley's Case.*

Lady *Dunboyne* had deposited title deeds to real estate—in which she had a life estate to her separate use without

1854.  
VAUGHAN  
v.  
VANDER-  
STEGEN.

*Solicitor's lien.*

A. and B., so-  
licitors in part-

1854.

VAUGHAN  
v.

VANDER-  
STEGEN.

nership, had a bill of costs against C. On their dissolution of partnership those costs were transferred to A. Afterwards A., at the request of the client, paid a debt for which she had deposited title deeds, and took possession of and afterwards retained the title deeds. He afterwards continued to act as her solicitor, and costs were incurred.

Held, that as to the joint bill of costs, there could be no lien in favour of A.; if otherwise, there would have been lien; and as to his separate bill of costs, he had taken the deeds as mortgagee and not as solicitor, and therefore had no lien for costs.

power of anticipation, with a general power of appointment by will only, and in default of appointment, remainder to her in fee, by way of equitable mortgage—with her bankers, to secure 43*l*. Mr. *Annesley*, who was Lady *Dunboyne's* ordinary solicitor, went with her to the bankers, and at her request paid the 43*l*. for her, and took possession of the title deeds, which he thenceforth and to the time of her death retained. No memorandum passed; and there was no evidence to show with what specific intention *Annesley* was permitted to take possession of the deeds. He afterwards continued to act as Lady *Dunboyne's* solicitor, as well during the concealment of the marriage as afterwards; but he knew of the marriage. The question was, whether he could claim the ordinary solicitor's lien for his costs, and retain the deeds till he was paid? With respect to the costs as to part, they were costs incurred to *Annesley* and his partner *Read* before the delivery of the title deeds to *Annesley*.

Mr. *Dickenson*, for Mr. *Annesley*.

The deeds came into his possession properly as Lady *Dunboyne's* solicitor. The title deeds relate to property to which she was entitled, and which she could have charged; therefore they ought not to be taken out of his possession.

The costs for which he claims were incurred in respect to business done by him as her solicitor generally. This is not the case of a party asking for active relief; he only asks not to have taken from him what he holds. If Lady *Dunboyne* had survived her husband, she clearly could not have taken the deed from him. What difference can her death make? Her heir, or devisee, can have no better right than she would have had.

Mr. *Greene*, contra.

The bills of costs were as to 130*l.*, the bill of *Annesley* and *Read*. The deeds never came into their joint possession; therefore no lien could attach on the deeds in favour of *Read*: *Re Forshaw* (a); *Pelly v. Wathen* (b). *Annesley* cannot, in point of solicitor's lien, stand in any better position than *Annesley* and *Read*.

Then as to the costs claimed by Mr. *Annesley* separately.

The deeds came into *Annesley's* possession, not as solicitor, but as paying off her mortgage, and therefore as in effect a transferee of the mortgage. The 43*l.* cannot be due to him except as mortgagee. It was a cash advance, for which he took the deeds as a deposit. At that time there were no separate costs. For what purpose and with what intention could he have taken the deeds except as a deposit to secure the 43*l.*? This case therefore is directly within *Pelly v. Wathen* and *Vaughan v. Vanderstegen* (c).

Next, at the time the deeds came into *Annesley's* possession, Lady *Dunboyne* had nothing in possession except a life interest, without power of anticipation. Now can the right by lien attach on deeds by the act of a party who has no present authority to part with them? Lady *Dunboyne* had only a reversionary interest in the estate, and she might charge the reversion by fine; but she could not part with the deeds in respect of her life estate, which she could not charge.

(a) 16 Sim. 121.

(b) 7 Hare, 351.

(c) 2 Drew. 165.

1854.

VAUGHAN  
v.  
VANDER-  
STEGEN.



1854.

VAUGHAN  
v.  
VANDER-  
STEGEN.

Mr. *Dickenson*, in reply.

*Re Forshaw and Pelly v. Wathen* are cases in which what was decided is, that lien can only be in favour of the person who claims the debt. Here the party claiming the lien is the person who claims the debt. As to the costs incurred by *Annesley* and *Read*, they belonged to *Annesley* alone at the time he took the deeds.

Mr. *Annesley* was not mortgagee at all. He paid the money and took the deeds, not as mortgagee, but as Lady *Dunboyne's* solicitor and agent. There is no intention shown on the part of Lady *Dunboyne* to deposit the deeds by way of mortgage.

On the other point, Lady *Dunboyne* was entitled to the reversion in fee, and she could have conveyed that remainder by fine. It was therefore capable of supporting lien.

The VICE-CHANCELLOR, after observing on the hardship of the case, proceeded :—

It is, I think, clear that a solicitor cannot sustain the claim of ordinary solicitor's lien upon deeds, unless they come into the custody of the same person whose bill of costs is the object of lien. Here the bill of costs was, as to part, the bill of *Annesley* and *Read* ; the deeds did not come into their joint possession. The debt was due at law to *Annesley* and *Read* ; and although in virtue of their contract, it actually belonged to *Annesley*, still the debt could not be sued for except in the names of *Annesley* and *Read* ; one of them could not have sued alone. *Annesley* then cannot have a lien for the debt on deeds which came to his hands subsequently to the debt. To the extent therefore of the joint bill of costs, I think it clear that there is no lien.

As to that part of the claim which consists of the bill of costs of *Annesley* alone, the question is this,—in what character *Annesley* became possessed of the deeds? If he became possessed of them as solicitor, then the question would arise, how far a married woman in Lady *Dunboyne's* circumstances could, by handing to her solicitor deeds, give a lien against herself and her heirs? However, that question does not arise, because I am of opinion that the deeds came into the possession of *Annesley*, not as solicitor but as mortgagee; that is, they came into the possession of one who, at the request of Lady *Dunboyne*, paid off her equitable mortgage and took the deeds; thus acquiring a right to stand in the mortgagee's shoes. Suppose there had been no bill of costs, and after *Annesley* had thus paid the 43*l.* and taken the deeds, Lady *Dunboyne* had applied for restoration of the deeds, *Annesley* would have had a right to say, I am not retaining these deeds as your solicitor; but, having paid off the debt to the banker and taken the deeds at Lady *Dunboyne's* request, he had a right to say he would stand in the shoes of the mortgagee; that he was equitable mortgagee for the 43*l.* That stamps the character in which he became possessed of the deeds. I am of opinion, therefore, that Mr. *Annesley* became possessed of the deeds not as solicitor, but as mortgagee; and therefore he is not entitled to a lien as solicitor for his bill of costs.

1854.

VAUGHAN  
v.  
VANDER-  
STEGEN.

1854 :  
26th June.

Practice.  
Amendment.  
Jurisdiction.

THOMPSON v. JUDGE.

Motion to amend after the cause was ripe for hearing, by making a totally new case, inconsistent with the case originally made, refused with costs.

Motion for leave to amend by making a case which was, in effect, that a part of a will was obtained by fraud, and the bequest void. Held, that such amendment could not be permitted, on the ground that if introduced, it made a case on which the Court had no power to adjudicate.

IN this case Mr. *Bazalgette* moved for leave to amend a bill after publication passed, and the cause ready for hearing.

The case made by the bill was, that the testator had, among other bequests, bequeathed to the Defendant certain pictures and other things; that he was induced to make such bequest through undue influence.

The motion was for leave to amend by striking this allegation out, and substituting for it an allegation that the testator never knew that the gift was introduced; never intended to make it; and that it was introduced by the fraud of the Defendant. The facts are more fully stated in the judgment.

Mr. *Bazalgette* referred to *Hindson v. Wetherill* (a) to show that this Court was not precluded from giving relief against a will fraudulently obtained.

Mr. *Glasse* and Mr. *Shee*, contra.

The Plaintiff cannot be allowed totally to alter his case after the cause is ripe for hearing. He might perhaps amend consistently with the case originally made; but here he seeks to establish, not a mere additional case, but a case the very opposite of the original. Besides, if the new case be true, it is one for the Ecclesiastical Court, to set aside a part of the will. *Hindson v. Wetherill*

(a) 18 Jur. 499, and afterwards affirmed on appeal.

is directly against the jurisdiction of this Court. The Plaintiff originally charges the Defendant with using undue influence. He finds he cannot now substantiate that, and he cannot now be permitted to alter his case into what is in effect a charge of forgery.

1854.  
  
 THOMPSON  
 v.  
 JUDGE.

Mr. *Bazalgette*, in reply.

We do not ask the Court at all to decide the question ; we only ask to be put into a position to try the cause on its real facts. On the question of jurisdiction, *Hindson v. Wetherill* does not repudiate the jurisdiction ; it was decided on the particular facts, and the question of jurisdiction is expressly saved. We have not raised any question as to the competency of the testator. The question is, did he intend this gift to his solicitor ? and the onus probandi in such a case is in the donee. We do not dispute the legal title of the executor ; but we say he holds, not for this legatee, but for us as residuary legatees.

The VICE-CHANCELLOR :

The Plaintiff, by his bill, states that the testator made a will, by which, among other bequests, he bequeathed to the Defendant *Judge* certain pictures and books in rooms in the testator's house, which he describes ; and he alleges that for several years previous to the testator's death, *Judge* was very intimate with and had acquired great influence over him.

The issue tendered by the bill is this :—that the testator knew well that he was making the bequest in question, and was induced to make it by undue influence. That issue was accepted by the Defendant ; the parties go into evidence on each side ; publication has passed ;

1854.  
THOMPSON  
v.  
JUDGE.

the cause is ready to be heard: and then the Plaintiff comes and makes an application to amend for the purpose of stating to this effect,—that instead of the testator being induced by undue influence to make the bequest, he did not know the will contained it; that it never was his intention to make any such bequest; that it was introduced fraudulently, without the knowledge of the testator, by *Judge*; and that is the issue which it is now intended to introduce by the proposed amendment.

That raises this serious question, whether the Court will, at this stage of a cause and in this state of the proceedings, allow the Plaintiff, not to introduce facts in support of the allegations of the bill, but to strike out the original allegations, and introduce allegations in direct contradiction to them; so that when the cause is brought to issue on one representation, that is to be struck out, and the cause is to be heard on an opposite representation. It is said that the effect of the evidence is, that the testator did not know of this clause in the will; that he never put it in. Now, supposing that the allegation were introduced, what would be its object? Why the object of the bill would be then to obtain a declaration that the bequest made by this particular clause in the will is no part of the will; in other words, to declare, that whereas the Ecclesiastical Court has decreed this instrument and every part of it to be the will, yet as to a part, it is not the will. Now the effect of grant of probate by the Ecclesiastical Court is to conclude this Court and all other Courts on the question, whether that which is copied in the probate, or any part of it, is or is not the will. No doubt there may be cases where this Court may find and enforce a trust; but it clearly has no power to declare that that which the probate represents to be the will, or any part of it, is not the will.

His Honor added that he found no sufficient evidence to show that the will was not read over to the testator, and that he did not know of the bequest to the Defendant being contained in it; and on both grounds refused the motion with costs.

1854.  
THOMPSON  
v.  
JUDGE.

1854:  
19th, 20th and  
22nd July.

*Superstitious  
Uses.  
Charity.  
Masses.*

HEATH v. CHAPMAN.

THIS case came on upon the certificate of the chief clerk; and the questions principally discussed, and on which the material part of the judgment was given, turned on the effect of certain trusts declared by the late *Domenico Dragonetti* (who was a Roman Catholic) during his lifetime. The certificate of the chief clerk was as follows on the material points :—

*Domenico Dragonetti*, the testator in the pleadings named, shortly before his death was desirous of bequeathing by his will the several annuities hereinafter mentioned, that is to say :—

1st. An annuity of 25*l.* to be paid to Signor *Giovanni Zimolo* of *Venice* (the husband of the testator's late sister *Marietta Zimolo*) for his life, and after his decease to be paid in perpetuity every year to the church at *Mestré* near *Venice*, where the said *Marietta Zimolo* was buried, for masses and requiems for the souls of the testator and the said *Marietta Zimolo*.

2nd. An annuity of 20*l.* in perpetuity to the cathedral church of *St. Mark* at *Venice* for masses and requiems

consequently, the property given to these uses went legatees of the donor.

Trusts declared for certain Roman Catholic chapels, for saying masses and requiems for the souls of the donor and for other souls, and for the souls of the "poor dead," and for other pious purposes. Held, that the gift for masses, &c., for the dead were superstitious and void; that the pious uses could not, as religious uses, be separated from the others, and were therefore also bad; and that the words pious uses could not be construed charitable uses; to the residuary

1854.

HEATH

v.

CHAPMAN.

for the souls of the said testator and the poor dead, and for other pious uses.

3rd. An annuity of 20*l.* in perpetuity to the Roman Catholic church in *Moorfields* in *London*, for the purpose of having masses and requiems said and performed for the benefit of the soul of the said testator and the souls of the poor dead, and for other pious uses ; and

4th. An annuity of 10*l.* per annum to the Defendant *Mary Chapman* during her life.

And having been informed by his solicitor that bequests for pious uses and masses for the dead were contrary to the spirit of the *English* law, and that difficulties must arise in supporting or carrying out trusts for such a purpose in this country, and that if he the said testator determined to carry into effect the gifts which he intended to make for those purposes, the same could only be done either by an actual transfer of a sufficient amount of stock in his (the testator's) lifetime into the names of trustees, to carry out his intentions, or by the actual payment of the necessary amount of money ; the said testator a few days afterwards had communications and interviews with the Plaintiffs severally as to the transfer into their names by him of bank annuities, and the application thereof by them for the purposes he was so as aforesaid desirous to effect ; and the Plaintiffs at such interviews severally promised to the said testator that they would perform the trusts so to be reposed in them ; and on the 1st day of April, 1846, the testator accordingly transferred 3,023*l.* 0*s.* 4*d.*, Three pounds five shillings per cent. annuities, then standing in his name in the books of the governor and company of the Bank of *England*, into the names of the Plaintiffs.

The said testator, after the transfer of the said bank annuities and the instructions so as aforesaid given by him to the Plaintiffs for the application thereof and of the dividends to arise therefrom, made and executed his will in writing, dated the 6th day of April, 1846; but did not thereby, or by any other writing, declare any trusts in respect of the said bank annuities, the whole whereof was at the time of his decease standing in the names of the said Plaintiffs.

1854.  
HEATH  
v.  
CHAPMAN.

The testator died on the 16th day of April, 1846.

There was considerable discussion at the bar on the question, whether on the facts there was any clear and valid declaration of trusts, but on that point the Court expressed in the course of the argument, a clear opinion.

Mr. *Hoare*, for the trustees of the fund, stated the case and left it to the Court.

Mr. *Wickens*, on behalf of the Crown, contended that the words "other pious uses" created a good charitable use. He relied on *Attorney-General v. Herrick (a)*.

Mr. *Baily* and Mr. *Bagshawe*, for the Reverend Mr. *Whitty*, the priest of the Roman Catholic chapel at *Moorfields*:

The gift is for requiems, masses, &c., and other pious uses. There is no compulsion under this on the priest to say masses for the dead. But if there were, prayers for the souls of the dead are not even contrary to the doctrine of the Church of *England*: *Breeks v. Woolfrey (a)*. How then can a gift for such prayers be an illegal use?

(a) Amb. 712.

(b) 1 Curteis, 880.



1854.  
  
 HEATH  
 v.  
 CHAPMAN.

Besides, to take the gift in detail: First, it is to say requiems. Now a requiem is not a mass at all; it is merely a series of psalms said or sung, without that which is the essence of the mass,—the sacrifice.

Then as to masses. If saying masses for the repose of the dead is a superstitious use, a gift for any mass generally must be, and that is clearly not the law; for though there may be a mass for a particular person's soul, which is different in form from the ordinary mass, it is not different in substance; and in every mass the priest necessarily prays for the souls of all the dead.

At common law there is nothing superstitious in praying for the souls of the dead; no authority is cited to show that there is. Unless the stat. of Edw. 6, c. 14, makes such a gift a gift to superstitious uses, there is nothing which does so. But the statute is only retrospective; it is so in terms, and it does not touch any future gift. *West v. Shuttleworth (a)*, which will be relied on by the other side, purports to rest on the authority of cases in *Duke*; but if you look at those cases, they do not at all support the proposition. [They referred in particular to a case of *Pile* and *The Clothworkers of London (b)*.] The others are to the same effect. The question is, therefore, is the plain effect of the statute to be altered? We do not therefore rely exclusively on the stat. of Will. 4, 1832; we claim under the common law, which does not avoid such gifts as those comprised in the trusts. But if our claim is not good at common law, at any rate it is under the stat. of Will. 4.

Mr. *Anderson* and Mr. *Ellison*, for the residuary legatees of the testator.

They argued at some length on the incompleteness of

(a) 2 My. & K. 684.

(b) *Duke*, 95.

the creation of the trust, and its revocability if it was well created. But on this point the Court was clear and called for no reply. They said also that the attempt was a violation of the Wills Act.

1854.  
HEATH  
v.  
CHAPMAN.

On the question of the trusts being for superstitious uses.

The stat. of Will. 4 does not touch the law as to superstitious uses; it puts Catholics, as regards all that relates to the creation and sustentation of their places of worship and education, on the same footing as Protestant dissenters; but it does not make any use which was superstitious, cease to be so. They referred to *Attorney-General v. Fishmongers' Company* (a), which was subsequent to the stat. of Will. 4; *Cherry v. Mott* (b); *Read v. Hodgins* (c).

*Brecks v. Woolfrey* (d) does not affect the question. That was in the nature of a criminal case, and all that was decided was, that persons putting on a tombstone a prayer for the dead, were not liable to ecclesiastical censure.

All the authorities since the stat. of Edw. 6 have recognized the state of the law as it is laid down in *West v. Shuttleworth* (e). The gifts therefore for the requiems and masses for the soul of the testator, &c., are clearly void. Then it is said that the gift for other pious uses may be good; but they cannot be severed from the general gift.

Then the question is, who is to take the property, the

(a) 2 Beav. 151.

(d) 1 Curt. 880.

(b) 1 Myl. & Cr. 123.

(e) 2 Myl. & K. 684.

(c) 7 Ir. Eq. Reports, 17.

1854.  
  
 HEATH  
 v.  
 CHAPMAN.

crown for charity, or the next of kin? *Attorney-General v. Herrick* (a) is rather against the claim of the crown; it cannot take the pious uses as such, and no *cy près* scheme will be directed: *Attorney-General v. Hinxman* (b). They cited also *De Garcin v. Lawson* (c); 2 *Wms. Exors.* (d).

The words "poor dead" do not refer to the souls of the indigent; "poor dead" is a technical term used by Catholics to designate the souls in purgatory; it is equivalent to "suffering souls."

Mr. *Elderton* appeared for *Mary Chapman*.

Mr. *Baily*, in reply, observed, that as to the gift for masses and other pious uses, even if, as to the other purposes, it could not be supported, it might as to that. All the purposes connected with the Church are necessarily pious; the whole money may therefore be applied to lawful purposes.

The other points made in argument are referred to in the Judgment.

The VICE-CHANCELLOR:

The first question raised is, whether such a gift as this, by a transfer of stock to trustees and a verbal declaration of the purposes, is a violation of the Wills Act; and I do not think it is. The Wills Act requires, in order that the instrument shall operate as a will, that it shall be signed, &c.; but all that does not prevent any person from doing what he might clearly have done before the

(a) Amb. 712.

(b) 2 Tac. & W. 270.

(c) 4 Ves. 433, n.

(d) Chapter on Superstitious Uses.

act, viz., by transferring a sum of stock to trustees, and verbally declaring the trusts, to create a trust.

1854.  
HEATH  
v.  
CHAPMAN.

It is quite clear that a trust may be by parol; but then the creator of the trust must act so as to make it a trust executed. If he executes it,—if, for instance, he transfers a fund into the names of trustees, and then verbally declares the trusts, and it can be clearly ascertained what the intended trusts are, that is a good creation of a trust.

Next, was this a revocable trust? Now, assuming that it was revocable by the testator, is it revocable as against him by his residuary legatees? He meant it for his own benefit; and even if he could have revoked it, yet, having created a trust for his own benefit, and not having revoked it, those who claim under or through him cannot, I think, revoke it.

But the material question is, whether the uses or purposes to which the donor has devoted portions of his property, are void as superstitious. Now, it is quite clear that, at all events before the 2 & 3 Will. 4, it was commonly assumed to be the law, and the assumption was acted on, that a gift to a priest for masses for the repose of the testator's soul, or a gift to a priest to say masses generally, was superstitious and void. The way in which this came to be the law is this: at the time of the passing of the stat. of Edw. 6, such gifts were void. That statute declares, as to certain uses, not that they are void—it assumes that—but that the property given to such uses is to belong to the Crown; and the Courts of Law have subsequently put this interpretation on that statute, not that it actually declares such trusts to be void, but that it stamps on all such trusts, whether created before or subsequently to the statute, the cha-

1854.  
  
 HEATH  
 v.  
 CHAPMAN.

racter of illegality, on the ground of being superstitious ; it gives to the Crown certain property devoted to such uses, but it stamps *all* such uses as superstitious and void. That has been the view of the Courts of Law ; and Lord *Cottenham*, when Master of the Rolls, in referring to the cases collected in *Duke*, refers to the cases where that is stated. The great case is *Adams v. Lambert (a)*, in the argument of which a number of other cases are cited, and in every one it is assumed, and in some decided, that gifts for such purposes were superstitious and void. It was contended by Mr. *Bagshawe* that the cases in *Duke* do not decide that point, and he referred to one in particular. But if that case is examined, it will be found that the point was, that the gift was not of the land, and therefore the king did not take the land ; that was all. A series of cases has left no doubt what the law was, at least down to the stat. of Will. 4. Then what did that statute do ? If it had meant to alter the law with respect to superstitious uses, certainly it uses the most singularly inapt words that could be well imagined for the purpose. But in truth there is no such indication of intention in the act at all. What it intended was this. As to their places of worship, as to their places of education, and as to the employment of persons officiating in their ceremonial, it intended to put Roman Catholics on the same footing as Protestant Dissenters. But it does not refer at all to the purposes to which property is devoted, which, if superstitious, still render the gift void. No doubt, if property is given for the use of a place of worship, that is good ; but the statute leaves quite untouched the case, where property is given for superstitious uses. That is the view taken in *West v. Shuttleworth*, with respect to which I must say, that besides feeling myself bound to follow it, even if I did not entirely agree with it, I do in

(a) *Duke*, 90.

fact entirely subscribe to the correctness of the reasoning in it. That case is almost on all fours with this; subject only to this, whether in this case there are any parts of the gifts which are to charitable uses. Now, first, there is the gift to the Church at *Mestré*, near *Venice*, for masses and requiems. Then next there is the gift to the Church of *St. Mark*, for masses for the soul of the testator, and for the poor dead.

1854.  
  
 HEATH  
 v.  
 CHAPMAN.

The question on this is, whether the gift for saying masses for the souls of the poor dead makes the gift charitable? The usual test applied to try questions of this kind has been the statute of the 43rd of Eliz. c. 4. In that statute are enumerated a variety of uses which are charitable. [His Honor referred to the section of the act.] Charitable uses are not exactly confined to those which are specifically expressed in the act; but to be charitable uses, they must be such as are there enumerated, or uses of an analogous character. Now, saying masses for the souls of the poor dead would have, I think, no analogy to any of those enumerated in the statute. Even if I were to take the construction of the word poor dead to mean those who in life were poor, too indigent to provide for masses, even then that would not be a charity within the meaning of the statute; but if, as I am told, the words are used to refer to the condition of the souls after death, in purgatory, it is impossible to say that that bears any the slightest analogy to any charity described in the statute.

Then as to the pious uses annexed to the gift, it appears to me, that, though every charitable use is in some sense a pious use, yet there are many pious uses, particularly in the view of a Roman Catholic, having no ingredient whatever of charity. Take the case which has been suggested in argument of lighted tapers; it is clear

1854.  
HEATH  
v.  
CHAPMAN.

that would be a pious use : so take the case of ornaments for adorning or dressing a figure of the Virgin Mary ; that would be, in the eyes of a Roman Catholic, a pious use, but it clearly would be no charity ; and it is clear that on principle a pious use is not necessarily a charitable use. Then the question remains whether, there being a gift to a church for, among others, pious uses, I may not construe that as a gift to the church for the ordinary purposes of the church, not being superstitious, and shut my eyes to the direction for saying masses and requiems for the souls of the dead ? But I think I cannot : the admixture of those uses vitiates the gifts to pious uses. Even if they could be supported as gifts for such pious uses as are charitable, I think they are vitiated by being connected with the direction for saying masses.

The only remaining question is, if these gifts are void, as being superstitious, and are not gifts for charitable purposes, the Crown is entitled or the residuary legatees ? and I am clearly of opinion that the residuary legatees are entitled ; that is consistent with the decision in *West v. Shuttleworth*, and with the statute of Edw. 6.

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1854:  
21st July.

*Vendor and  
Purchaser.  
Particulars of  
Sale.*

BRANDLING v. PLUMMER.

IN this cause a petition was presented by a purchaser, under the decree of the Court, for compensation.

He had purchased a particular lot, No. 6, which as to the point in dispute was described as follows:—"Eighty cottages built of stone, and eight cottages partly of timber, all in the occupation of the owners of *Sedghill* Colliery, or their undertenants or workmen." There were other tenements included in the lot, described as being in the occupation of tenants, but without the rent being mentioned. Most of the lots were over coal mines, which formed the subject of a subsequent part of the particulars of sale. At the end of the particulars of these land lots, and immediately preceding the part describing the mines, and headed "collieries," there was a general paragraph, referring to reservations of rights, containing the following passage:—"The mines and other minerals within and under such of the lots as are situate within the townships

A vendor, in his particulars of sale, described certain cottages as part of Lot 6, and as in the occupation of the owners of the *Sedghill* Collieries, or their undertenants or workmen. By a further particular he stated, that "the mines and minerals within and under such of the collieries as were situate within certain townships, were reserved to the owners

thereof, with such powers and privileges as belonged to them." It turned out that the mine under Lot 6 was not the *Sedghill* Colliery, but the *Hazelrigg* Colliery, and the owners of the *Hazelrigg* Colliery had in some way obtained or long used a right to build and use cottages on Lot 6 without paying rent, except a trifling compensation for surface damage, and they had transferred their right to the owners of the *Sedghill* Colliery:

Held, that the particulars did not, on the face of them, convey such information as the vendor ought to have given; but inquiries were directed as to the circumstances under which the cottages were occupied, and whether the owners of the *Sedghill* Colliery had any right against the vendor.



1854.  
BRANDLING  
v.  
PLUMMER.

of *Wideopen*, *Weetslaw* and *East Shuton*, are reserved to the owners thereof, with such powers and privileges as belong to them."

It turned out that the eighty-eight cottages paid no rent. They had been built and occupied for upwards of seventy years. They had originally, as it appeared, been so built and occupied by the owners of the *Hazelrigg* Colliery, which was under lot 6; and they had transferred their right to the owners of the *Sedghill* Colliery, who at the time of the sale were working both collieries. How the right had been acquired, whether by any deed or by wrongful occupation, did not appear clearly. The petitioner claimed compensation.

Mr. *Swanston* and Mr. *Baggallay*, for the petitioner.

The question is, what is the effect of the contract, having regard to the particulars of sale?

The purchaser sees cottages described as in the occupation of certain persons; that naturally leads to the inference that there is a rent paid. He valued the property according to the apparent value of the cottages; and it was a surprise upon him and a concealment of information that the vendor ought to have given, not to state the real circumstances.

Mr. *Glasse* and Mr. *W. D. Lewis*, for the vendors.

These particulars of sale could not mislead any one. It is said no rent is found to be payable; neither is any rent stated on the particulars of sale to be payable. The cottages are sold, described as subject to certain rights. Whatever are the rights existing in the persons described, subject to those rights the purchaser was apprised that he purchased, and he cannot complain that he is to take

subject to them. If he had inquired, as he might have done, he could have found what the facts are: *Dyer v. Hargrave* (a); *Attwood v. Small* (b); *Fewster v. Turner* (c); *Clapham v. Shillito* (d).

1854.  
  
 BRANDLING  
 v.  
 PLUMMER.

We have, by the particulars, described the property with the utmost accuracy. Besides, the passage in p. 427 distinctly calls the attention of the purchaser to the fact that the owners of the mines under the lots had certain privileges reserved. If he had taken the trouble to inquire, he would have found what those privileges were.

Mr. *Toller*, for Defendants in the same interest, and Mr. *Schomberg*, for creditors on the estate, insisted also on the passage in p. 427, observing that but for that, the purchaser might have claimed the mines; but that passage, excepting the mines, excepted also the rights of the miners; and the purchaser must be taken to have read that particular of sale as well as the rest. They suggested also the impossibility of fixing any data by which compensation could be measured. What was the rent that the purchaser had expected? what had he a right to expect? how was either to be ascertained? and on which was the compensation to be measured?

Mr. *Freeling*, for other parties, also opposed.

Mr. *Swanston*, in reply.

The VICE-CHANCELLOR:

The difficulty here, as in a great majority of the cases

22nd July.  
 Judgment.

(a) 10 Ves. 505.

(c) 6 Jur. 144.

(b) 6 Cl. & Fin. 232.

(d) 7 Beav. 146.

1854.  
BRANDLING  
v.  
PLUMMER.

which come before the Court, is not a difficulty as to what the law is, but as to the application of the law. There is no doubt what the principle is as to questions of this kind; it is the obvious duty of a vendor to make himself fully acquainted with all the peculiarities and incidents of the property which he is going to sell; and when he describes the property for the information of the purchaser, it is his duty to describe every thing which it is material to know, in order to judge of the nature and value of the property. It is not for him just to tell what is not actually untrue, leaving out a great deal that is true; and leaving it to the purchaser to inquire whether there is any error or omission in the description or not. The question in this case arises with respect to the description of a portion of the property sold, comprised in lot 6, of which Mr. *Smith* was the purchaser. [His Honor referred to the particulars set out in p. 427.] The question is, whether there is any material misdescription or error as to these eighty-eight cottages? Now, by looking at this printed particular, what would any individual know more of the property than might be obtained by ocular inspection? What information would he obtain from the particulars? No doubt they would inform him that the eighty-eight cottages were in the occupation of the owners of *Sedghill* Colliery, but that would give no information as to the nature of the occupation; and the inference would be, if this were all, that the occupation was occupation of the ordinary kind. If there had been a lease, it ought to have been mentioned; there being none, the inference would be naturally that the occupation was by persons employed by the owners of the colliery in connection with the colliery. But then there is the further passage [in p. 427]. Now that passage refers clearly to the prior lots; and I agree with the respondent that the purchaser

should have read that paragraph as well as any other ; and he must have seen what was the purpose of the passage. I do not, in fact, doubt that he read it.

1854.

BRANDLING  
v.  
PLUMMER.

Now what could the purchaser have collected from this passage ? Why, that with respect to the mines and minerals under the lot that he was about to buy, he would be subject to the powers and privileges vested in the owners of those mines ; that is, all the powers and privileges usual in mining leases. To those he could not complain of being subject ; but that could not lead him to conclude, when he saw by the description of lot 6 that the eighty-eight cottages were in the occupation of the owners of the *Sedghill* Colliery, that they were occupied by the owners of the colliery under lot 6. There is nothing to lead him to suppose that those persons were also the lessees of the colliery under lot 6. Though he knew that he was buying lot 6 subject to the powers and privileges of the owners of the colliery under lot 6, he could not expect to be afterwards told that the cottages were held by virtue of any of those powers or privileges. Allusion was made to his being a resident ; but that would not necessarily lead him to know that the owners of *Sedghill* colliery were tenants of the colliery under lot 6. He is described as tenant of the mansion-house, upon terms of quitting on the sale of the property. I infer from the statements that he was a recent resident ; but however that may be, I cannot impute to him any other knowledge than what is conveyed by the particulars of sale, and what any person going over the property would acquire from ocular inspection ; I cannot impute to him knowledge of an arrangement by which not only the miners had such privileges for sinking shafts, &c. as are usual, but that they had a right to build cottages for the use of their workmen, and not to a limited number, but as

1854.  
BRANDLING  
v.  
PLUMMER.

many as they liked; and not to pay any rent for them, but merely to pay for the damage done to the tenants of the soil.

No doubt, he might have gone to the houses to inquire; and if he had done so, and trusting to his own information, had not got full information, he might possibly have brought himself within a class of cases which has been referred to in the arguments.

Then it is suggested, that, though it is stated that the eighty-eight cottages are in the occupation of the owners of *Sedghill* Colliery, the occupation referred to was not occupation in the ordinary way; but that it was occupation under some special deed dated in 1771, by which the owners of *Hazelrigg* Colliery, that is, the colliery under lot 6, were entitled to the right to build cottages, subject to no other terms than those of making compensation for damage, and that those owners had parted with their right to the owners of *Sedghill* Colliery, and that the latter are now working both, so that the owners of *Sedghill* Colliery are now in the occupation of the colliery under the lot 6.

If that is so, it is a most material fact affecting the value of the property and the enjoyment of the purchaser; for he could not at any time say, "I want these cottages;" he is to be told by the owners of the *Sedghill* Colliery, that, by a deed of 1771, they are entitled to retain them for their occupation, as long as the collieries are worked.

It was clearly the duty of the vendors to have described that in the particulars of sale, if that is the fact. However, some of the respondents say it is not the fact; they say that the owners of *Hazelrigg* Colliery have been wrong-

doers all along, that their occupation has been wrongful, and that if Mr. *Smith* were to bring an ejectment he could turn them out; and to show that, the deed of 1771 is produced. Now, when that deed is looked at, I find that it does give leave to erect buildings of a certain description, that is buildings necessary for sinking shafts, engine houses, &c.; but I cannot find that it gives any right to erect cottages for the occupation of the workmen. But suppose the owners of *Hazelrigg* Colliery were wrong-doers. If, on the assumption of a right, they built the cottages, and have occupied them from 1771 downwards, and the owners of the land have stood by, it would be very difficult to say they could, by merely bringing ejectment in 1854, turn out the occupants.

1854.  
  
 BRANDLING  
 v.  
 PLUMMER.

The facts are in controversy. The material consideration is, that, whether the description is right or not, there is something material, or which may be material, to the interest of the purchaser, as to which the facts are not clear, and they must be ascertained before I can form an opinion whether I ought to give compensation or not.

His Honor directed an inquiry under what circumstances the cottages described as part of lot 6 were in the occupation of the owners of *Sedghill* Colliery or their undertenants or workmen, and whether the owners of *Sedghill* Colliery or their tenants, or any other and what persons, had any and what right, title or interest to or in the cottages as against the vendors?

1854:  
20th July.

Partition  
Commissioners.  
Cohereesses.

CANNING v. CANNING.

On a commission under a partition decree as between coheiresses, the eldest has no right of choice. The commissioners are to exercise their own discretion, and may take into account, in allotting, elder-ship or any other circumstance, and should only draw lots if they cannot on any grounds make a discretionary allotment.

IN this case a notice of motion was given to the following effect:—that the Court should appoint some proper and indifferent person to draw lots for the moieties, into which the commissioners, appointed under a commission of partition issued in the causes, and dated the 19th day of March, 1853, had by their certificate divided the hereditaments in the said commission mentioned, for the purpose of the said moieties being allotted to the Plaintiffs and the Defendant *Frances Catherine Canning* respectively, according to the exigencies of the said commission.

The ordinary partition decree had been made for the partition of certain lands between the Plaintiff *Maria Gordon Canning* (or those claiming under her) and the Defendant *Frances Catherine Canning*, and in pursuance of the decree a commission of partition had issued, directing the commissioners therein to make a fair partition, division and allotment, of the manors, lands, tithes, tenements and hereditaments comprised in and devised by the will of *Robert Canning*, the testator in the pleadings mentioned, and to divide the same as directed by the decree.

The commissioners divided the lands, but could not agree as to the allotment; the Plaintiff, as the eldest sister, claimed the one-half comprising the manor-house,

as of right. The Defendant denied any such right. The commissioners made a joint return, but did not file it, to the following effect:—

1854.  
CANNING  
v.  
CANNING.

“ We have been unable to agree as to the person to whom the lands, tenements and hereditaments mentioned in the said second schedule, which comprised the mansion-house and premises at *Hartpury*, should be allotted, one of us, namely, the undersigned *Richard Hall* having proposed that the allotment of the said shares should be made by lot, and the other of us, namely, the undersigned *Josiah Castree*, having declined to accede to such proposal, and having proposed that such allotment should be left to the determination of the Court, and the said *Richard Hall* having declined to accede to such proposal, we have not, under the circumstances herein stated, been able to come to any agreement as to the persons to whom the aforesaid moieties should be respectively allotted.”

Mr. *Baily* and Mr. *De Gex* supported the motion.

Mr. *Glasse* and Mr. *Freeling*, *contra*.

The case of *Curzon v. Lyster* (a) was referred to.

The VICE-CHANCELLOR :

In this case I think the order is in the common form, and the commission is in the common form. The object of the commission, as well as the order, is for the commissioners to do two things: one, to divide the property into two moieties, which as I understand they have done; and there is no objection to what they have done in that

(a) Seton on Decrees, p. 191.



1854.  
CANNING  
v.  
CANNING.

respect; and, secondly, when they have made their division into two parts, they were to allot one moiety to one party, the Plaintiff, and the other moiety to the Defendant. That they have not done. They have not said which part is for the Plaintiff, and which for the Defendant. They have not made a return as to that. The return is not as I understand a complete return, although it is stated they have signed and sealed it; at all events it is not filed. What they have done by that document, which purports to be the return they propose to make, is to say that they cannot agree as to which share they should allot to one, and which they should allot to the other. One proposes that it shall be done by drawing lots, and the other objects to that. I do not know that they suggest any substituted mode by which they wish the Court to decide.

Now, if that return had been filed, unless the parties had agreed, I must have been obliged to quash the return and send it back to the commissioners to make a fit and proper return, or to direct a new commission. What ought the commissioners to do in this case? It appears to me clear that they are not bound to draw lots; because if they were bound to draw lots, and if they had made a return upon any other footing, although satisfactory to the parties, they would not have performed their duty. They were not bound to draw lots. The word "allot" does not signify in this case a drawing of lots. Both popularly and legally the term "allot" has a different sense from merely drawing lots. It has the sense of appropriating, whether by drawing lots or otherwise, the respective shares to the respective parties.

Now it appears to me what the commissioners ought to do in this case is, that, having divided the property

into two equal parts, they should consider all the circumstances of the parties and the property. Suppose, for example (which sometimes happens), that one of the parties has property in a particular county or parish, and that one of the allotments is contiguous to the property already belonging to one party, and there is another allotment not contiguous, that would be a good ground, *cæteris paribus*, for allotting that particular portion to the individual to whom it is much more convenient to have it than the other. They may also take into consideration the circumstance, that one of these is the eldest daughter, and therefore, although she has no *right* of priority of choice, still her being the elder is a circumstance which the commissioners may consider to be a ground, *cæteris paribus*, of coming to a decision on the allotment. So, again, you have the circumstance that she is a married lady, and that her husband has taken the family name and has no mansion, and it is proposed that they should keep up the family mansion; and when the commissioners are looking into the matter they must exercise their discretion, and give the lots with reference to that state of circumstances, although the fact of the Plaintiff being the eldest daughter constitutes, as I conceive, no right or claim under the commission to priority of choice.

If the commissioners can find no reason weighing one way or the other, then they are reduced to the alternative of drawing lots, because there is nothing else to guide them. But it appears to me that the drawing of lots is the last resort, and ought only to be adopted when they do not find anything to guide their discretion one way or the other.

In this case the commissioners cannot agree as to what they should do. In strictness, what they ought to do

1854.  
  
 CANNING  
 v.  
 CANNING.

1854.

**CANNING**  
**v.**  
**CANNING.**

under these circumstances is, to make separate returns; and the Court would deal with the separate returns as it might consider advisable. But they have made or propose to make a joint return, saying they cannot agree. It appears to me that the wisest course for the commissioners (as I suppose the present return may be annulled, if the commissioners choose to tear the seal)—the wisest course would be to put an end to the present return, and leave them to consider the circumstances which have been stated, or any other circumstance upon which they may receive evidence, for it is open to them to receive evidence. If they can find no other ground for deciding, they should draw lots. If they cannot agree upon one or the other course, they must make separate returns.

The Court declined to make any specific order on the motion, considering that it had no authority to appoint a person to draw lots.

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1854:  
12th and 13th  
July and  
13th August.

*Estate.*  
*Fee.*  
*Fee Tail.*

WRIGHT v. VERNON.


THE question in this case was, what construction ought to be given to a limitation in a will to the right heirs of a person deceased by a particular wife for ever?

The limitations occurred in each of two wills, one made by *Frances Ann Langham* and the other by *Phillis Langham*, two sisters. These two ladies were the granddaughters of Sir *Thomas Samwell*, their mother, *Mary Langham*, being one of the daughters of that Sir *Thomas Samwell*.

Sir *Thomas Samwell* was twice married. He had issue by both those marriages. The issue by his first marriage, so far as it is necessary to state the individuals comprised in the class of issue by that marriage, were these:—he had a son, *Thomas*, who afterwards became Sir *Thomas Samwell*; and he had a daughter, *Mary*, who was Mrs. *Langham*. He had other daughters, but it is not necessary to mention them. The second Sir *Thomas Samwell*, who will be designated as the uncle, to distinguish him from the first Sir *Thomas Samwell*, the grandfather, had no legitimate issue. He had a natural son, who will be mentioned presently. *Mary*, the daughter of the grandfather, had issue three daughters, the two testatrices in question, and an elder daughter, *Millicent*, who was the wife of Mr. *Drought*. The two

By a will, an estate in remainder expectant on the determination of various limitations was given "upon trust for the right heirs of *A.* deceased (the father of testator's late uncle) by *Mary* his second wife, also deceased, for ever."

Held, that this was a limitation of an estate tail.

1854.  
  
 WRIGHT  
 v.  
 VERNON.

testatrixes were never married; but *Milicent* had issue a son, *Thomas Fuller Drought*, and two daughters, *Frances Drought* and *Juliana Drought*.

The issue of Sir *Thomas Samwell* the grandfather, by his second wife, whose name was *Mary*, were these:—he had a son, *Wenman*, who afterwards became Sir *Wenman Samwell* and who afterwards died without issue, and a daughter, *Catherine*, who was the wife of Mr. *Watson*. *Catherine* had issue several children. The only children of *Catherine* whom it is necessary to mention were—first, *Thomas Samwell Watson*, who afterwards took the name of *Samwell*, who is called throughout and who will be here called Colonel *Samwell*; another son, *Wenman*; a third son, *Atherton*, who was a lunatic, and a daughter, *Charlotta Felicia*, who married a Mr. *Tinley*. There was also another daughter, *Juliana*, who married but had no issue—Mrs. *Hollis*.


Neither Colonel *Samwell*, nor *Wenman*, nor *Atherton* ever had any issue; but *Charlotta Felicia* had several children; the only two whom it is necessary to mention being two daughters, *Frances*, who died unmarried, and *Charlotta Henrietta*, who married Mr. *Wright*, which Mr. *Wright* was the Plaintiff in the present suit. Besides the two daughters of *Charlotta Felicia*, Mrs. *Tinley*, mentioned, another daughter, *Clarissa Felicia*, who married Mr. *Woodford* and had issue, ought also to be mentioned.

The two testatrixes, *Frances Ann Langham* and *Phillis Langham*, were maiden ladies, living together, who made each a will, dated on the 12th April, 1827, and each of those two wills was in the same terms.

The substance of the will of Sir *Thomas Samwell* their uncle was as follows:—Sir *Thomas Samwell*, the uncle, being seised of freehold estate, by his will, dated the 1st November, 1788, devised the estate in question to his natural son *Thomas* for his life, with remainder to his first and other sons in tail male, with remainder to his half-brother, who was afterwards Sir *Wenman Samwell*, the son of the second marriage of Sir *Thomas Samwell*, the grandfather, for life, with remainder to his first and other sons in tail male, with remainder to *Thomas Samwell Watson* (Colonel *Samwell*) for life, with remainder to his first and other sons in tail male, with remainder to *Wenman* for life, with remainder to his first and other sons in tail male, with remainder to *Thomas Fuller Drought*, who was his grandnephew of the half-blood, being a descendant of the first marriage of the grandfather, for life, with remainder to his first and other sons in tail male, with remainder to his own right heirs. He had thus picked out and given life estates to each then existing male of either branch of the family, that is, the male of each of the two branches of the families of Sir *Thomas Samwell*, the grandfather, by his two marriages, except *Atherton*, whom he omitted, apparently because he was a lunatic. And, as has been said, having limited estates for life to those individuals, he limited remainders in tail male to their respective sons. The ultimate remainder in the will of Sir *Thomas Samwell* was to his own right heirs. He died on the 3rd of December, 1779, and at the time of his death his right heirs were his three nieces, the daughters of his sister *Mary Langham*, namely, *Milicent Mrs. Drought*, and *Frances Ann Langham* and *Phillis Langham*, the two testatrixes. The ultimate remainder in fee therefore expectant on the estates limited specially by the will of

1854.


WRIGHT  
v.  
VERNON.

1854.  
  
 WRIGHT  
 v.  
 VERNON.

Sir *Thomas Samwell*, the uncle, upon his death, vested in those three sisters, his nieces, his coparceners in fee.

At the time when these two ladies, *Frances Ann Langham* and *Phillis Langham*, made their respective wills, viz. in April, 1827, each of them was seised in fee of one-third of the estate in remainder expectant upon the estates limited by the will of Sir *Thomas Samwell*, their uncle; and the limitation which had to be construed in each of these two wills was the limitation made by those wills respectively of the one-third in remainder.

The limitations in the wills of those two ladies were as follows. [The Court referred only to one, because they were in the same terms.] The will of *Frances Ann Langham*, the elder of the two, was then as follows:— She first devised to her sister *Phillis Langham* for life, all her parts, shares and interests of and in all manors, lordships, advowsons, and so on, and real estates whatsoever and wheresoever. Then she says, “and from and after her decease I give and devise the said parts, shares and interests of all my real estates, except the messuage or dwelling-house wherein I reside,” unto two trustees, *Dayrell* and *Vigor*, “and their heirs, upon trust for my two nieces, *Frances Drought* and *Juliana Drought*, daughters of my late sister *Milicent Drought*, for and during their lives and the life of the longest liver of them, and from and after both their deceases upon trust for all and every the child and children of my said nieces and the daughter and daughters of my nephew *Thomas Fuller Drought*, equally between them, share and share alike, and the respective heirs of the body and bodies of all and every such child and children and daughter and daughters; and if there shall be a failure of issue of any of them, then, as to the share or shares of such of them



whose issue shall fail, upon trust for the survivors or survivor of them, equally between them, if more than one, share and share alike as tenants in common, and for the several and respective heirs of the body or bodies of such surviving or other child or children or daughter or daughters; and if all such children and daughters but one shall die without issue, or if there shall be but one such child or daughter, then upon trust for such surviving or only child or daughter, and the heirs of his or her body; and for default of all such issue, then upon trust for the right heirs of my grandfather Sir *Thomas Samwell*, Baronet, deceased (the father of my late uncle Sir *Thomas Samwell*), by *Mary* his second wife, also deceased, who was the daughter of Sir *Gilbert Clarke*, Knight, for ever." That ultimate limitation is the limitation which was the subject of discussion.

1854.  
WRIGHT  
v.  
VERNON.

Mr. *Glasse*, for the Plaintiff, after stating the facts, referred to *Fearne*(a) and *Mandeville's case* there quoted. Now, here the limitation is to the children of Sir *T. Samwell*, he taking no estate, by a particular ventre. The persons to take, cannot be heirs general; to be so, it must be indifferent of whose body they are heirs. Here, by the will, they must be heirs by a particular body, which is -equivalent to heirs in special tail. He next referred to *Littleton* (b), *Ross v. Morrice* (c), with reference to the observations there attributed to *Coke*, observing that *Coke* was then only counsel in the case, so that his denial of *Mandeville's case* being law, was of little value. He cited also sect. 31 of *Litt.*, and *Co. Litt.* 27 b.; 10 *Vin.* p. 258, 1 pl. T. 9; also p. 243, Q. pl. 1; p. 245, Q. pl. 10; and tit. R. pl. 6.

(a) 9th ed. pp. 80, 191.

(b) Sects. 16, 17.

(c) 2 Leon. 23, in 30 Eliz. 1588.



1854.  
  
 WRIGHT  
 v.  
 VERNON.

He cited also *Lee v. Brace* (b). All these authorities show that, where it is the intention of the donor to give an estate tail, the Court will so construe the limitation, though he may not have used the most apt legal words.

Mr. *Smythe* with him.

He referred to 2 *Prest.* on Estates (c), and commented also on the 30th sect. of *Litt.* and the case given in *Co. Litt.* (d). In the second volume of *Jarm.* on Wills (e) the doctrine is laid down as we contend it is in point of law. He commented also on *Mandeville's case*; *Southcote v. Stowell* (f); *Wills v. Palmer* (g); *Pybus v. Mitford* (h).

Mr. *Anderson*, Mr. *Surrage* with him, for other parties in the same interest.

There can by no possibility be heirs of Sir *T. Samuell* by his second wife, except the heirs of his body by her body; that is an estate tail. As to the words *for ever*, which will be relied on as giving a fee, it is not the estate that is to go for ever, but the *particular heirs*, who are for ever to be the persons to take, are designated. The words "for ever" are quite consistent with an estate tail. He referred to *Doe v. Colyear* (i); also *Doe v. Perratt* (k); *Sug. Law of Property, &c.* (l).

(b) Lord Ray. 101.

(c) Page 388.

(d) 20 b.

(e) Page 2.

(f) 1 Mod. 226; 2 Mod.

207.

(g) 5 Bur. 2615; also re-

ferred to in *Fearne*, p. 44.

(h) 1 Vent. 381; *Co. Litt.* 25 a, *notis.*

(i) 11 East, 548, reading from p. 553.

(k) 9 Cl. & Fin. 612.

(l) Page 275.

Sir *F. Thesiger* and Mr. *Campbell* for the Defendant, *L. Vernon* and wife, claiming as devisees under the will of the devisee of Colonel *Samwell*, contended that the limitation created a fee.

1854.  
  
 WRIGHT  
 v.  
 VERNON.

We do not deny that the limitations gave an estate by purchase to the party answering the description; that is common ground, and the only question is, what is the extent of the estate vested in the party described? It is clear, from the whole of the will, that the testatrixes did not intend to die intestate as to any part of their estates. The anxious wish to dispose of every thing is apparent. At the time the wills were made, the line of descendants under Sir *T. Samwell's* first marriage was very nearly extinct. If it became extinct, then if the testatrixes died intestate, some person extremely remote would succeed as their heir, which could not be their intention; and yet, although it is clear that they must have known the state of the family, and could not have intended that the remainder in fee should go to remote heirs, it is contended that the language used by them, and which does not necessarily have any such effect, is to create an estate tail, which would have that effect.

But the will itself, by the context, shows that the testatrixes could not have intended to create an estate tail. For by the part of the will immediately preceding they have given clear estates tail by apt legal words, so that they well knew how to give an estate tail, when they wished it. Upon authority, none of the cases cited reach this case. *Mandeville's case* is no doubt law, but it stands by itself. It is quite peculiar, and has been disapproved by most eminent persons. They referred to *Sugden's Law of Real Property* (a).

(a) Page 279.

1854.  
 WRIGHT  
 v.  
 VERNON.

The case in *Co. Litt.*(a) is contradicted by a subsequent passage in *Co. Litt.*(b). *Southcote v. Stowell* is of no authority, for the Judges thought themselves under the same difficulty which existed in *Mandeville's case*, viz., that if they did not hold it an estate tail, the limitation could not take effect at all, a difficulty which clearly did not exist. If the intention is taken as the rule, then the clear intention of these testatrixes being not to die intestate, is there any thing to show that the words *must* be construed so as to give an estate tail, the effect of which is to make them intestate? None of the cases cited contain the large words, "*right heirs*" and "*for ever*," which occur here. But, supposing even that those words are not sufficient to give at once a fee to heirs general, at any rate they are sufficient to vest a fee in the person found to fill the character of heir special, but taking as first purchaser, as it is conceded Colonel *Samwell* did take. If the estate is once vested in him, why must it thenceforth pursue a special devolution? What is there to make it do so, when he takes as first purchaser, and the words are large enough to give him a fee? On this point they referred to *Roe d. Nightingale v. Quartley* (c), where it was held that a limitation to the right heirs of husband and wife gave an estate to the person who was the heir of both parents, as if the limitation had been to the right heir, and that the person who filled that character took the fee. That shows that where the limitation is to the right heirs of A. and his wife, specially designated, which is the same as to the right heirs of A. by his wife B., the estate being once vested in the person who answers the description, the devolution is then simply in fee.

(a) 20 b.

(b) 27 a.

(c) 1 Term Rep. 630.

Mr. *Bagshawe*, with them.

Both the wills on the face of them show that the testatrixes knew the state of the family. They gave estates tail to the children of their nieces and of *Thomas Fuller Drought* in the most formal and technical manner. If, then, they knew the state of the family and meant to give estates tail to the persons intended to benefit by the clause in question, what possible reason can be given why they did not use apt words as they had done before?

Mr. *Baily* and Mr. *Renshaw*, for trustees against whom an account of back rents was asked, argued on the same side.

The two wills are cotemporaneous. They exhibit careful provision throughout for disposing of the whole of the testatrixes' property. If the limitation in question is construed to pass a fee, that intention will be carried out; but if it is an estate tail, the intention is defeated. They commented also on *Mandeville's case*, to show that it was a special and entirely exceptional case.

Mr. *Swanston*, for the children of the Defendant *Vernon*, in the same interest.

If this will is construed by the familiar rules of construction, there can be no doubt. It is clear, indeed it is our common case, that Colonel *Samwell* was the person designated by the clause as first purchaser. How, then, is he to take? The will itself says, for ever. What can that be but a fee? The gift is to the person who at a certain time fills the character of heir of Sir *Thomas Samwell* by his second wife, and that person, so ascertained and designated, is to take for ever. It is not the succession of heirs of the body of Sir *Thomas Samwell* by his second wife; that would require an estate in Sir *Thomas Samwell*; the words heirs of Sir *Thomas Sam-*

1854.

WRIGHT  
v.  
VERNON.

1854.

WRIGHT

v.

VERNON.

*well* by his second wife, are merely descriptive of the person, who, being thus ascertained as first taker, is to take for ever, that is, in fee. What is suggested on the other side is, that the words of description are to defeat the words of limitation; their construction nullifies the effect of the words "for ever." Then on the authorities. *Mandeville's* case is an authority, we admit, for a case exactly like it, but not one step further. It is not pretended that it is a case that can be explained. It is never treated as intelligible on principle. He referred to *Fearne* (a). He observed also on the guarded way in which Lord *Coke* treats the case in *Co. Litt.* (b). The sole ground of that decision was, that otherwise the limitation would have been wholly defeated. But here, if the limitation is to be construed as a limitation in tail, it will not be so, for the reason that otherwise the limitation would be wholly defeated; for clearly Colonel *Samwell*, being once designated, *could*, under the limitation, take in fee. The only assignable reason for *Mandeville's* case does not therefore apply.

In *Southcote v. Stowell* the judges conceived themselves to be under the same difficulty as existed in *Mandeville's* case. Moreover, in that case the only question was, what sort of *remedy* the claimant could have? The intention was clearly for an estate tail.

In *Roe v. Quartley* it is quite clear the Court considered that *Hester* took the fee. They expressly allude to it in p. 635.

Mr. *Willes*, of the common law bar, with him, referred also to *Roe v. Quartley*.

It is said that in that case the limitation was to the *heir*, in the singular. But for the purpose of our case

(a) Page 83.

(b) 26 b.

it is quite immaterial whether the words were "*heirs*" or "*heir*." The word "*heirs*" is just as good as "*heir*" to describe the person to take; and then the words "for ever," which are the material words, show how he is to take, viz., in fee. But if anything turns on this, it is material to show the accuracy of the report in which the word is "*heirs*." The first edition uses the word *heirs*; so it is quoted in *Fearne*, when he cites the case. The first edition is the reporter's, and had his own revision. The edition of 1817 bears no name; it is probable that it was not revised by any lawyer. In the same edition there is, in another case of *Lockyer v. Offley (a)*, an error, the word *insured* is used,—it should be *insurer*,—and is so in the first edition. There can be no doubt that "*heirs*" was the word used in the limitation, and then the case is all but on all fours with the present case.

1854.  
WRIGHT  
v.  
VERNON.

Mr. *Teed* and Mr. *H. Stevens* appeared for the devisees in fee on trust for sale of a third of the estate. They were also interested in supporting the construction that the limitation created an estate in fee, in consequence of a partition having taken place, the validity of which might be affected if the wills were held to create an estate tail.

Mr. *Glasse*, in reply.

The words are not only a designation of a person who answered the particular description, but also a description of the nature of the inheritable estate. The testatrixes intended to benefit the line of the second wife; to have given a fee would just have defeated that intention.

The argument that the testatrixes did not intend to

(a) Page 260.

1854.  
 ~~~~~  
 WRIGHT  
 v.  
 VERNON.

die intestate is of no weight; for the mere reversion expectant on an estate tail, is never in any case taken into account by the Court, in considering the question of intention of testacy.

You are asked to collect two separate intentions from the clause. You are asked to say that the first part is to describe the person to take, and that the words *for ever* describe the inheritable quality of the estate. That is not the construction, as the whole phrase must be taken together as indicating the person to take and the devolution, which is according to the words a special devolution.

*Roe v. Quartley* is not an authority even if *Hester* was in that case held to take in fee, which is not clear. But that was not the point argued; the only point was whether she took as heir of the bodies of the husband and wife, and what portion she took of the property.

The VICE-CHANCELLOR, after stating the facts and the limitation:

It cannot, I think, admit of the smallest doubt that if, in the lifetime of Sir *Thomas Samwell*, the grandfather, lands had been devised to him for his life, with remainder to his right heirs by *Mary*, his second wife, for ever, this would have created an estate tail in Sir *Thomas Samwell*. And why would it have been an estate tail, and not an estate in fee simple? Because the limitation is not to his right heirs *simpliciter*, but to his right heirs by a particular wife, which description necessarily involves the conclusion that the right heirs intended are not heirs general, but heirs special, heirs of his body begotten by him on the body of a particular wife. The effect, therefore, of a limitation to the right heirs of Sir

*Thomas Samwell* by a particular wife for ever, is precisely the same as that of a limitation to the heirs of *his body* by that particular wife for ever. The words "of his body" are not in the least degree necessary to this construction of the term "heirs" or "right heirs," because, without their insertion, the full and absolute effect of them is involved in the description, "his right heirs by *Mary*, his second wife," which description limits the meaning of the term "right heirs" to heirs special procreated by himself, as effectually and as necessarily as the words "of his body" could do, if they had been added.

1854.  
WRIGHT  
v.  
VERNON.

Such would be, beyond all doubt, as I conceive, the effect of such a limitation as this, when preceded by the limitation of an estate of freehold to the ancestor. But in the case which is now under consideration, there is no estate at all limited to Sir *Thomas Samwell*, the ancestor; in fact, he had been dead many years before the date of the two wills.

What, then, is the effect of a limitation direct to the right heirs of a man by a particular wife, or (which is the same thing) to the heirs of his body by that particular wife, without any estate being limited to himself?

This question will be best answered in the very language of *Fearne*, in his book on Contingent Remainders. After discussing the principles on which, by virtue of the rule in *Shelley's case*, the limitation to the heir or heirs of the body of a man, by way of remainder, preceded by an estate of freehold limited to himself, unites with it and vests the inheritance in the ancestor, he proceeds thus (a): "But here it is to be remarked,"

(a) Page 80.

HH 2



1854.  
  
 WRIGHT  
 v.  
 VERNON.

&c., "as there was to entitle the first special heir and his issue male under it." And after some further illustration of the subject, he concludes thus: "It seems, in truth, of a compound or intermediate description," &c., "to his heirs of that description."

The doctrine thus stated by *Fearne* involves this clear proposition or rule, that where, without any estate of freehold limited to the ancestor, lands are limited to his heirs special, the terms used to designate the class of special heirs to whom the lands are given have a twofold operation, viz., first, they serve to point out who is to be the first taker, and secondly, they serve also to specify and prescribe what estate such first taker is to have. By virtue of their *first* operation, the first taker must be the person who answers the description of the special heir at the time when the gift comes into operation, and such person must take by purchase; and by virtue of their *second* operation, the estate which such first taker is to have must be such an estate as will descend to the whole series of persons who shall successively answer the description of the special heirs of the ancestor named, in the same manner as if the limitation to the heirs special had been preceded by an estate of freehold limited to the ancestor, and so the estate tail had originally vested in and had descended from the ancestor.

Now, in the present case, the ancestor named is Sir *Thomas Samwell*, the grandfather; no estate is limited to him, but the lands are limited to his heirs special, viz., to his right heirs by *Mary*, the second wife, for ever. Moreover, it is quite clear that if this limitation *had been* preceded by an estate of freehold limited to Sir *Thomas Samwell* himself (in his lifetime), he would have taken an estate tail, descendible to all the heirs of his

body by *Mary*, his second wife. Apply, then, the rule: the terms used to designate the class of heirs who are to take are "right heirs of Sir *Thomas Samwell* by *Mary*, his second wife." Give those terms their twofold operations; 1st, they point out who is to be the first taker, and that must be Colonel *Samwell*, because he answered the description of right heir of Sir *Thomas Samwell* by *Mary*, his second wife, at the time when the will took effect; 2ndly, those same words also serve to specify and prescribe the estate which Colonel *Samwell* took, and that must be such an estate as would descend to the whole series of persons successively answering the description of "right heirs of Sir *Thomas Samwell* by *Mary*, his second wife:" in other words, such an estate tail as he would have had if the limitation to the right heirs of Sir *Thomas Samwell* by his second wife *Mary* had been preceded by an estate of freehold limited to Sir *Thomas Samwell* himself (he being alive), in which case the estate tail would have originally vested in Sir *Thomas Samwell*, and would have descended from him upon Colonel *Samwell* as the issue in tail. Why was Colonel *Samwell* the person to take? Why not the heir general of Sir *Thomas Samwell*, the grandfather? Because the limitation was not to the heirs general of Sir *Thomas Samwell*, the grandfather, but to his heirs special, viz., his right heirs by his second wife *Mary*, who must necessarily be heirs of his body, begotten by him on the body of that particular wife; and Colonel *Samwell* was the person answering that description. What estate then did he take? Why not a fee simple? Because, by virtue of the doctrine, as stated by *Fearne*, the same words of description operated not only to point him out as the person to take, but also to prescribe and denote *what estate* he was to take, which must be an estate tail, and not a fee simple, because it must be such an estate as

1854.

WRIGHT  
v.  
VERNON.

1854.  
  
 WRIGHT  
 v.  
 VERNON.

would descend through the whole class of persons successively answering the description of "right heirs of Sir *Thomas Samwell* by his second wife *Mary*," and therefore it must be precisely the same as the estate which would have been in him if such estate tail had originally vested in Sir *Thomas Samwell*, the grandfather, and had descended from him through the line of the heirs of his body by his second wife *Mary*.

But the doctrine in question involves also another proposition or rule, viz. that on failure of the designated heirs special descending from the first taker, the estate tail will then devolve on the person who at the time of such failure shall answer the description of such special heir of the ancestor named; and such person will take the same estate tail, not by purchase, but *by descent*, just as if the estate tail had originally vested in and had descended from the ancestor named, and so on, *toties quoties*, until there is a total failure of all the heirs special of the ancestor named.

Applying then this rule to the present case, on the death of Colonel *Samwell* without issue in January, 1831, the estate tail devolved (by descent) on his brother *Wenman*, who then answered the description of "right heir of Sir *Thomas Samwell*, the grandfather, by *Mary* his second wife;" and upon the death of *Wenman* without issue in July, 1841, the same estate tail devolved (*by descent*) on his brother *Atherton* (the lunatic), who then answered that description; and upon his death without issue in May, 1851, the same estate tail devolved (*by descent*) on his niece *Charlotta Henrietta*, Mrs. *Wright*, and his great-nephew *Wenman Langham Woodford*, the son of *Clarissa Felicia*, Mrs. *Woodford*, who then answered that description, as coparceners; and under

Mrs. *Wright's* disentailing deed her husband Mr. *Wright*, the present Plaintiff, became entitled to her moiety in fee simple.

1854.  
WRIGHT  
v.  
VERNON.


The doctrine, for the statement of which I have quoted the language of *Fearne*, being chiefly founded on *Mandeville's case*, stated in *Co. Litt. (a)*, it is perhaps not to be wondered at that the learned counsel for the Defendants should have laboured to vilipend the authority of that case. They have industriously collected all the passages from the books containing remarks upon the anomalous character of the estate tail which results from the decision; and they have represented that case as an isolated, eccentric case, unworthy to be regarded as establishing any general principle, and only to be followed (if to be followed at all) under circumstances precisely and in specie the same. But the authority of *Mandeville's case*, and the doctrine derived from it, are not to be so got rid of. I do not purpose to discuss the merits of the original decision, though perhaps it might not be very difficult to show that the exigency of the stat. *De donis*, which peremptorily directed that the will of the donor should always for the future be observed, left no alternative but to decide *Mandeville's case* as it *was* decided; inasmuch as when the estate was limited to the heirs special of a particular ancestor, without any estate of freehold limited to the ancestor himself (either expressly or by implication), it was impossible to effectuate that expressed will of the donor, and to make the estate pass through the whole series of the special heirs designated, except by regarding the limitation as if it were an estate tail which had originally vested in and had descended from the ancestor himself; and yet the first taker

1854.  
WRIGHT  
v.  
VERNON.

must take as purchaser, because no estate did in fact vest in or descend from the ancestor. Obedience to the positive injunction of the statute *De donis* appears to have necessitated the creation of this anomalous kind of entail, which Lord *Hale* fitly terms a quasi entail, partaking of the opposite qualities of purchase and descent. But without discussing the necessity or propriety of the original decision, it is sufficient to say that so far from *Mandeville's case* standing isolated and solitary, confined in its effects to the narrow circle of its own special circumstances, and barren of general consequences, it has in fact established, or helped to establish, a broad general doctrine of the widest application, which has been part of the recognized law of the land for at least five centuries, a doctrine which has been repeatedly recognized and followed in subsequent cases, and has never (that I am aware of) been denied by any judicial authority, and which every writer on the subject, whatever may be his comments on the anomaly which it involves, invariably asserts or assumes to be settled and established law.

It is no sufficient argument against this doctrine to say (as was said in the course of this hearing), that if the matter were *res integra*, no Court would in the present day originate such a doctrine; for, supposing the remark to be true, the same argument would be at least equally available for getting rid of the rule in *Shelley's case*; for I am sure that we may predicate of that rule, with at least as much confidence as with respect to the doctrine of *Mandeville's case*, that if the matter were *res integra*, no Court would in the present day originate *that* rule. I cannot, however, help observing that I do not see why we are to assume that the doctrine of *Mandeville's case* is so contrary to the spirit of judicial decision at the present day, when it is recollected that the *ground* of the doctrine


is, that the will of the donor is to be observed,—in other words, that the intention of the parties is to be carried into effect; and that all the *objections* to the doctrine are based upon difficulties arising out of purely technical learning. Surely it would hardly be in accordance with the spirit of the present day to sacrifice the intention of the parties to technical difficulties.

1854.  
  
 WRIGHT  
 v.  
 VERNON.

But however that may be, I think it ought to be quite sufficient to maintain the validity of any legal doctrine against the most ingenious arguments with which it can be assailed, that for 500 years it has been the law of the land, not obsolete or dormant, but recognized, adopted, acted upon, without variation and without authoritative contradiction; and that no instance can be cited in which its adoption has worked wrong or injustice, or has violated the apparent intention of the parties; and I think this is no more than can be truly said of the doctrine under consideration.

I have said that the doctrine in question has never (that I am aware of) been denied by any judicial authority. The only case which the learning and industry of the Defendants' counsel have enabled them to cite which has the least semblance of being opposed to the doctrine, is *Roe d. Nightingale v. Quartley (a)*. That was a devise to *Hester*, the daughter of *Walter Read*, and the heirs of her body for ever, and for default of such issue, then to such child or children as *Mary*, the wife of *Walter Read*, was then supposed to be *enceinte* with, and to the heirs of the body or bodies of such child or children; and for default of such issue, *to the right heirs of Walter Read and Mary his wife for ever. Mary Read*, who


(a) 1 T. R. 630.

1854.  
  
 WRIGHT  
 v.  
 VERNON.

was not *enceinte* as the testator had supposed, died before her husband *Walter Read*; and he married again and had a daughter, *Constantia*, by such second marriage, and died leaving *Hester* and *Constantia* surviving. *Hester Read* died without issue. The Plaintiff in the action claimed under *Hester Read*, on the assumption that she was tenant in fee under the ultimate limitation. The Defendant claimed under *Constantia*, assuming that she was tenant in fee under the ultimate limitation. The only questions argued were, whether under this limitation "to the right heirs of *Walter Read* and *Mary* his wife for ever," the estate vested in *Hester Read*, the heir of both *Walter* and *Mary*, or whether it went to *Constantia*, the child of the second marriage, as the heir of the survivor, or whether it vested as to one moiety in the heir of *Walter*, and as to the other moiety in the heir of *Mary*, in which case *Hester*, being sole heiress of *Mary*, would take one moiety, and *Hester* and *Constantia*, as the co-heiresses of *Walter*, would take the other moiety between them. Those were the points and the only points argued. It was determined that the remainder vested in *Hester* as the right heir of both *Walter* and *Mary*. Now it is to be observed that the question was not raised whether, under this limitation, *Hester* took an estate in fee or in tail; it was tacitly assumed that she took the fee, and of course the action could not have been maintained if she had not taken the fee; nor was *Maxdeville's case*, or the doctrine derived from it, at all referred to. That alone would be sufficient to render the case a very slender authority for overturning so long established a doctrine.

But, further, a little consideration of the case makes it evident that the intention of the testator was that the right heir of *Walter* and *Mary Read* should take an

estate in fee simple, and not an estate tail under the ultimate limitation; because a previous estate tail general was expressly limited to *Hester*, and also to the child of which *Mary Read* was supposed to be *enceinte*; and therefore to construe the ultimate limitation to be also an estate tail general would be to suppose that the testator's intention, in the event of *Hester* or the expected child being the heir of *Walter* and *Mary* at their deaths (and as to *Hester* that proved to be the event), was to give to the same person two estates tail of precisely the same nature and quality, the one by way of remainder after the other—a supposition so absurd, that it was assumed by both parties, and the Court, without a word passing on the subject, that the ultimate limitation gave a fee to the person or persons who might be held entitled to take.

1854.  
  
 WRIGHT  
 v.  
 VERNON.

It is not unworthy of remark that *Fearne*, who (as I have mentioned) lays down the doctrine derived from *Mandeville's case* in the most clear and explicit terms as a settled rule of law, does not seem to have entertained the remotest conception that it was in any degree affected by *Roe v. Quartley*, for he does not so much as notice that case in the part of his work in which he states this doctrine; but in another part of his work (*a*) he cites *Roe v. Quartley* with reference to a different point.

Beyond all doubt, then, the doctrine in question (which may with propriety be called the rule in *Mandeville's case*) must be considered as perfectly well settled. It has been recognized as such in numerous cases, and more particularly was acted upon in *Southcote v. Stowell* (*b*), and in *Wills v. Palmer* (*c*); and every text writer upon

(*a*) Page 40.

Mod. 207, 211.

(*b*) 1 Mod. 226, 237; 2

(*c*) 5 Burr. 2615.



1854.

WRIGHT

v.

VERNON.

the subject treats it as part of the established law of real property, that a limitation to the heirs special of a particular ancestor, without any estate of freehold limited to the ancestor himself, is to be construed (whether in a deed or a will) as giving to the person first answering the description of such heir special an estate tail, descendible through the whole series of such special heirs.

But of course this rule, like every other rule of construction, is subordinate to the paramount rule of giving effect to the testator's intention to be collected from the whole will; and therefore if you can collect the testator's intention in framing such a limitation to have been simply to point out the person who is to take, and to give to such person a fee simple, that intention must undoubtedly prevail. Is there, then, any sufficient ground for inferring such intention in the present case? In my opinion the inference is the other way. At the date of the will the testatrix (I am of course speaking of each testatrix) had, besides her sister, no relation of the whole blood descended from her grandfather, Sir *Thomas Samwell*, except her nephew, *Thomas Fuller Drought*, and her two nieces, *Frances* and *Juliana Drought*. The testatrix had nothing to devise but the ultimate reversion in fee in one-third of the estate, which would not fall into possession until after the death of *Thomas Drought* and failure of his male issue, besides other estates tail. She therefore first provides for all her relations of the whole blood (*i. e.* the descendants of her grandfather, Sir *Thomas Samwell*, by his first marriage), present and future, who were not already included in the series of limitations in the will of her uncle, Sir *Thomas Samwell*, and she does this by giving a life estate to her sister, then life estates to the two nieces, and then estates tail to their children and to the female children of the nephew (the

male children of the nephew being included in the previous entail under the uncle's will). By means of these limitations, added to those contained in the will of the uncle, every future descendant of Sir *Thomas Samwell*, the grandfather, by his first marriage (*i. e.* of the whole blood of the testatrix), whether present or future, would become entitled to the property or a share of it, all future descendants taking an estate tail. The testatrix then, contemplating the possibility (perhaps the probability) of a total failure of that branch of the descendants of Sir *Thomas Samwell*, the grandfather, turns next to the other branch, *i. e.* his descendants by his second marriage; and how is it most probable that the testatrix should intend the property to go in that branch? Is it most probable that she should intend it to go to the whole series of persons who should constitute that class, in a regular course of succession, or that it should go absolutely and exclusively to such one of them (whoever it might be) who should happen at the death of the testatrix to answer the description of right heir of the grandfather by his second wife? Surely the former is a more *probable* intention than the latter. Her object seems to have been to preserve the property in the two branches of the family of the grandfather. And what are the terms which she uses to express her intention—"To the right heirs of Sir *Thomas Samwell*, the grandfather, by *Mary* his second wife, for ever." Now, apart from any rule of law, it appears to me that those words in themselves, being in the plural number, point much more naturally and obviously to a series or succession of persons than to a single individual. I think if she had intended to designate a single individual, she would have used the term "right heir," in the singular, although I do not mean to say that that is absolutely necessary. So that, independently of any legal canon, it appears to me, that,


1854.

WRIGHT  
v.  
VERNON.

1854.  
WRIGHT  
v.  
VERNON.

whether we regard the probable intention, or the natural import of the terms used by the testatrix, both are in favour of that construction according to which the property would pass to the whole series of the special heirs included in the description of "right heirs of Sir *Thomas Samwell*, the grandfather, by *Mary* his second wife." Is there, then, any rule of law which forbids the adoption of this construction? So far from it, this construction is actually prescribed and required by the long established legal doctrine to which I have before referred.

It was argued on the part of the Defendants, that if such had been the intention of the testatrix, she would probably have named each individual of that second branch of the family then existing, and have limited the estate in distinct terms to them and the heirs of their bodies, using the same language as to them which she has used with regard to the first branch. No doubt that form of devise might have been adopted; but the adoption of it would have required the introduction into the will of a long series of successive estates tail, for there were then living at least eight individuals of the descendants of Sir *Thomas Samwell*, the grandfather, by his second marriage; whereas the form of devise which the testatrix has adopted does, by virtue of the rule of law derived from *Mandeville's case*, effect precisely the same purpose by a clause of three lines. And I cannot see why that settled rule is to be cast aside or departed from, merely because the testatrix has in another part of the will used different language to create particular estates tail. Nor can I consider that the use of the term "*right heirs*," or the addition of the words "*for ever*," ought to have the effect of preventing the application of the rule to this case. For, with respect to the expression "*right heirs*," as I have before observed, a limitation to the



right heirs of a man by a particular wife is precisely the same as a limitation to the *heirs of his body* by that particular wife; indeed, if it were not so, Colonel *Samwell* could not take any estate at all, since he was not the *right heir (simpliciter)* of Sir *Thomas Samwell*, the grandfather. And though it is true that the words "for ever," when added to a devise to a particular individual, are sufficient in a will to give him a fee; yet cases almost without number occur in which those words are added to limitations of estates tail, as in *Whiting v. Wilkins* (a); *Powsey v. Lowdall* (b); and *Doe d. Hanson v. Fyldes* (c), and many other cases; among others, in that case of *Roe v. Quartley*, the first limitation was of an estate tail to *Hester*, which was given by the words to *Hester* and the heirs of her body for ever; the use of the words "for ever" in those cases only indicating the donor's or testator's intention that the estate is to pass to the whole series of special heirs indicated, continuously and without interruption. And such, I am persuaded, was the testatrix's design in adding them in the present case.

I am of opinion, therefore, that Colonel *Samwell* took an estate tail and not an estate in fee simple, which estate tail devolved by descent to all the persons successively answering the description of "right heir of Sir *Thomas Samwell*, the grandfather, by *Mary* his second wife," until it vested in Mrs. *Wright* and the Defendant *Wenman Langham Woodford*, as coparceners. Mrs. *Wright* having executed a disentailing deed, duly acknowledged, her moiety has become and is now vested in the Plaintiff, Mr. *Wright*, under the limitations contained in that deed.

(a) 1 Bulst. 219.

(b) Styles, 244, 273.


(c) 2 Cowp. 833.

1854.

WRIGHT  
v.  
VERNON.

1854.  
WRIGHT  
v.  
VERNON.

In the course of the argument, one of the learned counsel for the Defendants pointed out a circumstance which (if the Court is at liberty to have regard to it in putting a construction on each of these two wills) appears to me to corroborate the view I take of the intention of each testatrix in the ultimate devise in question. I allude to the circumstance that the two wills are dated the same day, and all the devises and limitations in both wills are precisely the same, and are expressed in precisely the same language, without the variation of a single word; from which the learned counsel drew the inference (most justly, as I think) that these two sisters, who were maiden ladies, far advanced in life, and who (as may be collected from their wills) were living together in the same house, made their wills in concert with each other, and under a mutual compact that they should both devise their respective thirds of the lands to the same persons and classes of persons, and for the same estates, each intending that her third part of the lands should, throughout the whole series of limitations, devolve precisely in the same line of succession as her sister's third. And not only is such identity of intention manifest in the devises of the real estate, but it runs through all the dispositions of the personal property also, each will containing nearly forty pecuniary legacies or annuities of precisely the same amount, given to precisely the same individuals and charitable institutions, accompanied by precisely the same expressions of regard or good will towards the legatees, couched in exactly the same language, and each will containing a long series of trusts and limitations respecting the testatrix's residuary personal estate, which are *verbatim et literatim* the same in both wills. Nay, so curiously is this identity of intention manifested, that even the bequests of special articles of ornament and other personal chattels are in most instances identical.



Now, with respect to the devolution of the real estate, which is all I have here to look to, it is obvious that this identity of intention will be far more effectually carried out by construing the ultimate limitation as giving an estate tail descendible through the whole series of persons who should be successively heirs of the body of Sir *Thomas Samwell*, the grandfather, by *Mary* his second wife, according to the doctrine in *Mandeville's case*, than by construing it as giving an estate in fee simple to the person who at the death of the testatrix should answer the description of right heir of the grandfather, by *Mary* his second wife. For if the latter construction were adopted, this result might have happened, that the respective third shares of the two sisters might have passed by their wills to different persons in remainder, inasmuch as the person answering that description at the death of the testatrix, first dying, might have been a different person from the one who answered that description at the death of the testatrix last dying, and so the third share of the one testatrix would have passed by her will to one person in fee, and the third share of the other testatrix would have passed by *her* will to a different person in fee.

But though I have adverted to this point, I confess I think it at least very doubtful whether, for the purpose of construing either of these wills, the Court is at liberty to take into consideration the circumstance of its agreement with the other will, inasmuch as neither will contains any express reference to the other; indeed, I incline to think that to do so would be a violation of the rule which forbids the admission of extrinsic evidence to construe a written instrument; and therefore I wish it to be understood that I do not at all rely upon it. I should have come to just the same conclusion upon either will by itself, even if the other had not existed.

1854.

WRIGHT

v.

VERNON.



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I N D E X  
TO  
THE PRINCIPAL MATTERS.

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**ADMINISTRATION.**

Where a person deceased died domiciled in Ireland, leaving property in Ireland and England, and the same executors in both countries. Held, that an Irish judgment had priority over English simple contract creditors, against Irish property remitted to England from the executors, and being there administered. [*Cook v. Gregson*] 286

**ADVANCEMENT.**

A., by her will, gave all her estate to her sister; afterwards she transferred stock into their joint names, as it appeared, for the purpose of saving legacy duty. The will was void. Held, that the transfer was intended to vest the beneficial estate by survivorship in the sister, and that she took the stock to the exclusion of A.'s next of kin. [*Deacon v. Colquhoun*] . . . 21

**AMENDMENT.**

1. Motion to amend after the cause was ready for hearing, by making a totally new case, inconsistent with the case originally made, refused with costs.

2. Motion for leave to amend by making a case in effect that a part of a will was obtained by fraud, and the bequest void. Held, that such amendment could not be permitted, on the ground that if introduced it made a case on which the Court had no power to adjudicate. [*Thompson v. Judge*] . . 414

**APPOINTMENT BY WILL,  
GENERAL POWER OF.**

1. A married woman, having a life estate in personalty to her separate use, with a general power of appointment by will, does not, by exercising that power, make the property applicable to the payment of her engagements in the nature of debts, viz., of such engagements as would be charges on her separate estate. [*Vaughan v. Vanderstegen*] 165

2. A married woman had a life estate in personalty to her separate use, with a general power of appointment by will, in default of appointment over. She had also real estate similarly settled, except that, in default of appointment, the ultimate



limitation was to her and her heirs, so that her husband should not be benefited by the curtesy. She borrowed money, fraudulently representing herself to be single, and purported to execute a mortgage of some of the settled real estate, with the ordinary covenant to pay. Afterwards, she by will appointed her freehold and personal estate chiefly to her children, and then died. Held, that, by the fraud, the married woman made the appointed estate liable as general assets, as if she had been a feme sole in respect of it; and that the mortgagee had a right not only to a charge on the mortgaged real estate to which she was entitled in remainder, but, if it was not sufficient, he was, by reason of the fraud, entitled to rank as a creditor on her general assets, and to take the appointed personal fund, if there was not enough without. The decision in *Vaughan v. Vanderstegen*, ante, p. 165, confirmed, where there is no fraud. [*Vaughan v. Vanderstegen*] . . . 363

#### APPORTIONMENT.

The stat. 4 & 5 Will. 4, c. 22, requires, in order to exclude apportionment, either an express direction that there shall be none, or language so express in the terms of gift, that apportionment is clearly impossible consistently with it. Inference from the whole tenor and context of the will, is not sufficient to exclude the operation of the statute. [*Tyrrell v. Clark*] 86

#### ASSETS.

A married woman having a life estate to her separate use in certain leasehold and personal property, with a general power of appointment by will only, appointed to children.

Held, that, in administering her estate, a tradesman supplying her with goods while she concealed her marriage and dealt with him as a single woman had a claim to be paid out of the appointed fund. [*Vaughan v. Vanderstegen*]. 408

#### BLANKS IN WILL.

A testator gave to his wife the income of his property in the funds, East India stock or elsewhere, for her life. The principal of all such funds and stock and property he bequeathed and devised as follows:—He bequeathed "one-half of my [*here there was a blank*] son Montague James, to be under his own control, and the other moiety in trust for the children of my daughter Fanny." He made his son executor and residuary legatee. Held, that no construction could be put on the blanks, and the son, as residuary legatee, took the whole. [*Taylor v. Richardson*] 16

#### CHANCERY AMENDMENT ACT.

1. The 36th section of the Chancery Amendment Act, 15 & 16 Vic. c. 86, requires special reasons to be shown to the Court, affecting either particular witnesses or particular facts. [*Rogers v. Hooper*] . . . 97
2. The 53rd section of the 15 & 16 Vict. c. 86, has no application after decree; nor before decree, for bringing new parties before the Court; but only for bringing forward new facts between the same parties. If new parties are to be brought before the Court, there must be a supplemental bill. [*Commerell v. Hall: Same v. Bloomfield*] . . . 194

#### CHARITY.

Trusts declared for certain Roman Catholic chapels, for saying masses

and requiems for the souls of the donor and for other souls, and for the souls of the poor dead, and for other pious purposes. Held, that the gifts for masses, &c., for the dead were superstitious and void; that the pious uses could not, as religious uses, be separated from the others, and were therefore also bad; and that the words pious uses could not be construed charitable uses; consequently, the property given to these uses went to the residuary legatees of the donor. [*Heath v. Chapman*] . . . 417

#### CHARITABLE TRUSTS ACT.

A private charity Act, passed shortly before the Charitable Trusts Act, 1853, gave power to the trustees in any matter in which they were to act, with the approbation of the Court of Chancery, to lay proposals at once before the judge in chambers. Held, that this was not repealed by the 17th sect. of the Charitable Trusts Act; but the necessity of a preliminary application to the Chancery Commissioners was added. [*Re Bingley Free School*] . . . . . 283

#### CO-HEIRESSSES.

See PARTITION.

#### COMMISSIONERS.

On a commission under a partition decree as between co-heiresses, the eldest has no right of choice. The commissioners are to exercise their own discretion and may take into account, in allotting, eldership or any other circumstance, and should draw lots only if they cannot on any grounds make a discretionary allotment. [*Canning v. Canning*] 434

#### CONDITION.

1. A testator by his will gave to his married daughter 2,000*l.* for her separate use, "*to be in bar and full discharge of all other claims which she or her said husband might have or make on his estate.*" Held, that this was not like a case of election properly, nor a condition of forfeiture; but that the legacy was a discharge, *pro tanto*, of any rights which the wife, or husband in her right, might have against the estate; and that the husband and wife were properly joined as Plaintiffs. [*Hardingham v. Thomas*] . . . . . 353
2. Land was sold by the mortgagees of B., consisting of a circular plot, surrounded by a ring called the Park Drive. It was stipulated that if used for building, villas of a certain size were to be built; that the ground between the villas and the Park Drive should be laid out in lawn or pleasure grounds down to the Park Drive; that a footpath of the width of fifteen feet should be laid out round the whole of the northern, southern and western boundaries of the said land. The Park Drive round the circular piece belonged to B.; the part outside had originally been his, but, with a small exception, had been sold by him. Held, that the condition about the footpath was too vague to be enforced, and that the purchaser was not bound to make it, and could not be restrained from using the land in any way inconsistent with making it. [*Taylor v. Gilbertson*] . . . . . 391

#### CONSENT.

By a marriage settlement in 1834, the husband gave a bond for 2,000*l.* to the trustees, to be paid within six months of the marriage; to be

left outstanding with the consent in writing of the wife and husband, and to be called in with the like consent. Another debt of 4,000*l.* was included in the settlement. The 2,000*l.* was never got in. The husband became bankrupt in 1836; the trustees proved for the debt, but afterwards joined in a supersedeas, on the bankrupt guaranteeing to his creditors 16*s.* 6*d.* in the pound. The other creditors were so paid; the trustees never took their composition. In 1838 the wife and husband gave a written consent that the debt should remain out on the husband's bond; no other consent was ever given. The husband was again bankrupt in 1847. In 1834 the trustees had, at the instance of the husband (having no power to invest in the purchase of land), purchased copyhold lands and buildings with part of the 4,000*l.* The husband erected new and valuable buildings on the land at his own expense, increasing its value far more than 2,000*l.* There was no evidence to connect this outlay with the discharge of the bond debt. Held, 1st. That the trustees were liable for not getting in the money before 1836, if there was no consent; 2nd. That the wife's consent, in 1838, was not retrospective. [*Wiles v. Gresham*] . . . . . 258

#### CONSTRUCTION.

1. A testator gave specific real estate and his personal estate, property and effects to his wife for life; and after her death he gave the aforesaid specific real estate, with all monies, rights, credits, &c., "and all property whatever that should be remaining after his wife's decease," to his children. Held, that the children took his real estate in fee. [*Footner v. Cooper*] . . . 7
2. A. and B. were tenants in tail in common of copyhold premises with cross remainders. B. borrowed for A. certain sums of money, for which the title deeds of the whole property were deposited with the lender, and A. signed a memorandum of deposit, undertaking to surrender his interest. B. signed at the foot the following memorandum,—"I join in the deposit." A. died, leaving B. the remainderman in tail of his moiety. Held, that the debt was a charge on the moiety which had been A.'s, but not on that of which B. was originally tenant in tail. [*Pryce v. Bury*] . . . . . 11
3. A testator gave to his wife the income of his property in the funds, East India stock or elsewhere, for her life. The principal of all such funds and stock and property he bequeathed and devised as follows:—and he bequeathed "one-half of my [*here there was a blank*] son Montague James, to be under his own control, and the other moiety in trust for the children of my daughter Fanny." He made his son executor and residuary legatee. Held, that no construction could be put on the blanks, and the son, as residuary legatee, took the whole. [*Taylor v. Richardson*] . . . 16
4. A testator gave to his eight nephews and nieces, naming them, provided that if any of them should die in his lifetime without leaving children; or, as to the nephews, should survive him and die under twenty-one, without leaving children; or, as to the nieces, should survive him and die under twenty-one, without having been married, the share of each of them so dying, as well original as accruing, should go to the survivor and survivors, other and others. The testator revoked the trust created as regarded two

- of his nephews, A. and B. A. had attained twenty-one, survived the testator, and was living. B. attained twenty-one and died, living the testator. Held, that the limitations over their shares were revoked, and that they went to the heir-at-law and next of kin. Gift to an executor of 100*l.*; gift by a codicil of 500*l.* in substitution thereof,—then that gift revoked; the prior gift of the 100*l.* is not set up again. [*Boulcott v. Boulcott*] . . . . . 25
5. A testator gave his residue to his wife *for her and her son's* support, clothing, and education, until he should attain twenty-one. If he died under twenty-one, then he gave all the interest of his bank stock to his wife for life; after her death, he gave all his property to his daughter: Held, that the son did not take any estate by implication on attaining twenty-one; but there was an intestacy. [*Fitzhenry v. Bonner*] . . . . . 36
6. Testator gave a portion of his personal estate to the seven children of his son, and his wife, naming them, "together with every other child hereafter to be born of the said (wife) during the life of the said (husband), or within nine months after his decease, in equal shares, with benefit of survivorship." He then directed their maintenance with the dividends until the youngest should attain thirty; then upon trust for them respectively, and the survivors and survivor of them, in equal shares, "with power to the trustees to make such distribution sooner if they think fit," provided the youngest child should have attained twenty-one. Held, that the period of division was the death of the husband, or the short period limited after his death; that the clause of maintenance till thirty, and postponing payment till then, did not disturb the previous vesting in the children surviving the husband, so as to introduce remoteness, and that, consequently, one child having died, living its father, her share went over to those who should be surviving at his death. [*Hodson v. Micklethwaite*] . . . . . 294
7. A marriage settlement contained a clause, by which it was agreed, and the husband covenanted, that if any real or personal estate should descend or devolve to, or vest in the wife, or in any person in trust for her, the husband should make, do and execute, or cause or procure to be made, done, or executed, or join or concur with the wife in making, doing or executing, all such acts, deeds, &c., as should be necessary for settling such property on the trusts of the settlement. A legacy was left to the wife for her separate use. Held, that it did not come within the agreement and covenant to settle contained in the settlement. [*Ramsden v. Smith*] . . . . . 298
8. A will contained a gift to children, and the issue of deceased children, in language which clearly did not vest it in any till the youngest should have attained twenty-one. In a subsequent part there was a declaration as to the vesting of the shares, expressed with much obscurity, and partially inconsistent with the language of the gift. Held, that it must be rejected, and the clear gift must take effect; consequently, that the shares did not vest till the period prescribed, and the representatives of a child, who died before the youngest attained twenty-one, took nothing. [*Bickford v. Chalker*] . . . . . 327

**CONTRACT.**

An agreement was in the following words: "A. agrees to pay 625*l.* for the cottage and stable, B. paying the expenses of the lease held by Mr. C. Signed A." Held, that such an agreement was not sufficient within the Statute of Frauds. A party contending for specific performance must show that his conduct has been fair. If he has made material misrepresentations to the defendant, it is no answer to say that the defendant might have found out they were misrepresentations. Specific performance is not of course, because there is a contract, but a relief in the nature of indulgence peculiar to the jurisdiction of equity. [*Cor v. Middleton*] . . . . . 209

**COPYHOLD.**

On a foreclosure of an equitable mortgage of copyhold, the mortgagor, being the person to take the necessary steps for an effectual surrender, must pay the expense of all such steps. [*Pryce v. Bury*]  
41

**COSTS, ORDER OF PAYMENT OF.**

Costs of litigation in the Ecclesiastical Court for determining which is the testator's will, although ordered by the Ecclesiastical Court to be paid out of the estate, are postponed to the costs of administration in this Court. [*Major v. Major*] . . . . . 281

**COVENANT TO SETTLE.**

A marriage settlement contained a clause, by which it was agreed, and the husband covenanted, that if any real or personal estate should descend or devolve to or vest in

the wife or in any person in trust for her, the husband should make, do and execute, or cause or procure to be made, done or executed, or join or concur with the wife in making, doing or executing, all such acts, deeds, &c., as should be necessary for settling such property on the trusts of the settlement. A legacy was left to the wife for her separate use. Held, that it did not come within the agreement and covenant to settle contained in the settlement. [*Ramsden v. Smith*] . . . . . 298

**DEED.**

A marriage settlement contained a clause, by which it was agreed, and the husband covenanted, that if any real or personal estate should descend or devolve to or vest in the wife, or in any person in trust for her, the husband should make, do and execute, or cause or procure to be made, done or executed, or join or concur with the wife in making, doing or executing, all such acts, deeds, &c., as should be necessary for settling such property on the trusts of the settlement. A legacy was left to the wife for her separate use. Held, that it did not come within the agreement and covenant to settle contained in the settlement. [*Ramsden v. Smith*] . . . . . 298

**DEMURRER.**

The case made by the bill was this:—It alleged title, under several instruments, to certain real estates settled thereby, one of such deeds creating a term to raise a sum of money not yet raised. It alleged possession or receipt of the rents in some of the defendants, and that they had possession of some of the deeds, and that they had given

notice to tenants not to pay rent to the plaintiff, and threatened to distrain. It alleged that the trustee of the term refused to assign it to the plaintiff. It prayed, among other things, a declaration, that under certain of the instruments the plaintiff was entitled to the estates; and that, on payment of the money to be raised by the term, by him, he was entitled to a surrender or an assignment of the term. Held, that there was an equity for that relief, if for no more; the bill was not therefore demurrable. [*Saunders v. Richardson*] . 128

#### DOWER.

A testator gave annuities to his widow, charged on land, certain freehold parts of which he had no power to demise, and as to certain copyhold parts of which it was contended that it did not pass by his will. He declared that such annuities were in satisfaction of "all dower and thirds, at the common law or otherwise, which she would or might have been entitled to in default of his will." Held, that the widow was put to her election, as well as to the freehold lands which he had no power to devise as to the freebench out of the copyhold. [*Nottley v. Palmer*] . . . 93

#### ELECTION.

1. A testator gave annuities to his widow, charged on land, certain freehold parts of which he had no power to devise, and as to certain copyhold parts of which it was contended that it did not pass by his will. He declared that such annuities were in satisfaction of "all dower and thirds, at the common law or otherwise, which she would or might have been entitled to in default of his will." Held, that

the widow was put to her election, as well as to the freehold lands which he had no power to devise as to the freebench out of the copyhold. [*Nottley v. Palmer*] . 93

2. A testator by his will gave to his married daughter 2,000*l.* for her separate use, "*to be in bar and full discharge of all other claims which she or her said husband might have or make on his estate.*" Held, that this was not like a case of election properly, nor a condition of forfeiture; but that the legacy was a discharge, *pro tanto*, of any rights which the wife, or husband in her right, might have against the estate; and that the husband and wife were properly joined as plaintiffs. [*Hardingham v. Thomas*] 353

#### EQUITY.

The case made by the bill was this:—It alleged title, under several instruments, to certain real estates settled thereby, one of such deeds creating a term to raise a sum of money not yet raised. It alleged possession or receipt of the rents in some of the defendants; and that they had possession of some of the deeds; and that they had given notice to tenants not to pay rent to the plaintiff, and threatened to distrain: it alleged that the trustee of the term refused to assign it to the plaintiff. It prayed, among other things, a declaration that under certain of the instruments the plaintiff was entitled to the estates; and that on payment of the money to be raised by the term by him, he was entitled to a surrender or assignment of the term. Held, that there was an equity for that relief, if for no more, and the bill was not therefore demurrable. [*Saunders v. Richardson*] . 128

## EQUITIES, PRIORITY BETWEEN.

Vendor conveyed without receiving his purchase-money; the receipt of it was endorsed on the deed, and the title deed delivered to the purchaser. The purchaser then made a mortgage by deposit, and absconded. Held, as between the vendor's lien for his unpaid purchase-money and the right of the mortgagee, that the possession of the title deeds, and the fact of the endorsement of the receipt on the deed, gave the mortgagee the better equity. Principles of the rule as to the effect of priority in point of time. [*Rice v. Rice*] . . . 73

## EQUITABLE MORTGAGE.

1. On a foreclosure of an equitable mortgage of copyhold, the mortgagor, being the person to take the necessary steps for an effectual surrender, must pay the expense of all such steps. [*Pryce v. Bury*] 41
2. A solicitor took a deposit of a policy from his client, under a parol agreement that it was to secure his then existing costs. Afterwards he made advances and took an assignment of the policy to secure them; the deed saying nothing about the costs. Held, that the deed expressing no agreement that it was to include the costs, the possession under it merged the possession under the deposit, and the policy was only a security for the advances. [*Vaughan v. Vanderstegen*] . . . 289

## ESTATE [FEE].

A testator gave specific real estate, and his personal estate, *property* and effects to his wife for life;

and after her death he gave the aforesaid specific real estate, with all monies, rights, credits, &c.," and all property "whatever that should be remaining after his wife's decease," to his children. Held, that the children took his real estate in fee. [*Footner v. Cooper*] 7

## ESTATE [TAIL].

By a will, an estate in remainder expectant on the determination of various limitations was given "upon trust for the right heirs of A. deceased (the father of testator's late uncle) by Mary, his second wife, also deceased." Held, that this was a limitation of an estate tail. [*Wright v. Vernon*] . . . 439

## ESTATE [IMPLIED].

A testator gave his residue to his wife *for her and her son's* support, clothing and education, until he should attain twenty-one. If he died under twenty-one, then he gave all the interest of his bank stock to his wife for life; after her death, he gave all his property to his daughter. Held, that the son did not take any estate by implication on attaining twenty-one; but there was an intestacy. [*Fitzhenry v. Bonner*] . . . 36

## EVIDENCE.

On the examination of witnesses orally, under the 15 & 16 Vict. c. 86, if a document is put into the hands of a witness by the party examining him, the other side may require to see the document: 1. If the witness is examined upon its contents generally. 2. If, although the document is originally shown to the witness merely to refresh his memory, questions are after-

wards put relating to its contents. He may not require to see the document: 1. If the document is put into the hands of the witness merely to refresh his memory, and nothing more is done. 2. If he is examined merely to prove the handwriting. [*Lord v. Colvin*] 205

#### EVIDENCE BY AFFIDAVIT.

The 36th section of the Chancery Amendment Act, 15 & 16 Vict. c. 86, requires special reasons to be shown to the Court, affecting either particular witnesses or particular facts. [*Rogers v. Hooper*] 97

#### EXECUTORS.

A trustee of the legal estate in a mortgage in trust for A. absolutely, executed a re-conveyance, and signed a receipt for the mortgage money, and handed it to one of A.'s executors, who was also his own solicitor, and who afterwards misapplied the money. Held, that the money having got into the hands of the executor, the trustee was not liable. [*Waugh v. Wyche*] 318

#### FEE.

1. By a will, an estate in remainder expectant on the determination of various limitations was given "upon trust for the right heirs of A. deceased (the father of testator's late uncle) by Mary, his second wife, also deceased." Held, that this was not a limitation in fee, but a limitation of an estate tail. [*Wright v. Vernon*] . . . 439
2. A testator gave specific real estate, and his personal estate, *property* and effects to his wife for life; and after her death he gave the aforesaid specific real estate, with all monies, rights, credits, &c., "and all property whatever that should be remaining after his wife's decease," to his children. Held, that the children took his real estate in fee. [*Footner v. Cooper*] . . . 7

#### FEE TAIL.

By a will, an estate remainder expectant on the determination of various limitations was given "upon trust for the right heirs of A. deceased (the father of testator's late uncle) by Mary, his second wife, also deceased." Held, that this was a limitation of an estate tail. [*Wright v. Vernon*] . . . 439

#### FEME COVERTE.

1. A married woman having a life estate in personalty to her separate use, with a general power of appointment by will, does not, by exercising that power, make the property applicable to the payment of her engagements in the nature of debts, viz., of such engagements as would be charges on her separate estate. [*Vaughan v. Vanderstegen*] . . . 165
2. By a marriage settlement in 1834, the husband gave a bond for 2,000*l.* to the trustees, to be paid within six months of the marriage; to be left outstanding with the consent in writing of the wife and husband; and to be called in with the like consent. Another debt of 4,000*l.* was included in the settlement. The 2,000*l.* was never got in. The husband became bankrupt in 1836; the trustees proved for the debt, but afterwards joined in a super-seedeas, on the bankrupt guaranteeing to his creditors 16*s.* 6*d.* in the pound. The other creditors were so paid; the trustees never took their composition. In 1838 the wife and husband gave a written consent that the debt should remain out on the husband's bond.



No other consent was ever given. Held, that the wife's consent, in 1838, was not retrospective. [*Wiles v. Gresham*] . . . . . 258

3. A married woman had a life estate in personalty to her separate use, with a general power of appointment by will, and in default of appointment over. She had also real estate similarly settled, except that, in default of appointment, the ultimate limitation was to her and her heirs, so that her husband should not be benefited by the curtesy. She borrowed money, fraudulently representing herself to be single, and purported to execute a mortgage of some of the settled real estate, with the ordinary covenant to pay. Afterwards, she by will appointed her freehold and personal estate chiefly to her children, and then died. Held, that, by the fraud, the married woman made the appointed estate liable as general assets, as if she had been a feme sole in respect of it; and that the mortgagee had a right not only to a charge on the mortgaged real estate to which she was entitled in remainder, but, if it was not sufficient, he was, by reason of the fraud, to rank as a creditor on her general assets, and to take the appointed personal fund, if there was not enough without. The decision in *Vaughan v. Vanderstegen*, ante, p. 165, confirmed, where there is no fraud. [*Vaughan v. Vanderstegen*] . 363

#### FRAUD.

- A married woman had a life estate in personalty to her separate use, with a general power of appointment by will, in default of appointment, over. She had also real estate similarly settled, except that, in default of appointment, the ultimate

limitation was to her and her heirs, so that her husband should not be benefited by the curtesy. She borrowed money, fraudulently representing herself to be single, and purported to execute a mortgage of some of the settled real estate, with the ordinary covenant to pay. Afterwards, she by will appointed her freehold and personal estate chiefly to her children, and then died. Held, that, by the fraud, the married woman made the appointed estate liable as general assets, as if she had been a feme sole in respect of it; and that the mortgagee had a right not only to a charge on the mortgaged real estate to which she was entitled in remainder, but, if it was not sufficient, he was, by reason of the fraud, to rank as a creditor on her general assets, and to take the appointed personal fund, if there was not enough without. The decision in *Vaughan v. Vanderstegen*, p. 165, confirmed, where there is no fraud. [*Vaughan v. Vanderstegen*] 363

#### FRAUDS, STATUTE OF.

- An agreement was in the following words: "A. agrees to pay 625*l.* for the cottage and stable, B. paying the expenses of the lease held by Mr. C. Signed A." Held, that such an agreement was not sufficient within the Statute of Frauds. [*Cox v. Middleton*] . . . 209

#### FREEBENCH.

- A testator gave annuities to his widow, charged on land, certain freehold parts of which he had no power to devise, and as to certain copyhold parts of which it was contended that it did not pass by his will. He declared that such annuities were in satisfaction of

"all dower and thirds at the common law or otherwise which she would or might have been entitled to in default of his will." Held, that the widow was put to her election, as well as to the freehold lands which he had no power to devise, as to the freebench out of the copyhold. [*Nottley v. Palmer*]

93

## GIFT INTER VIVOS.

A. by her will gave all her estate to her sister; afterwards she transferred stock into their joint names, as it appeared, for the purpose of saving legacy duty. The will was void. Held, that the transfer was intended to vest the beneficial estate by survivorship in the sister, and that she took the stock to the exclusion of A.'s next of kin. [*Deacon v. Colquhoun*] . . . 21

## HEIR AT LAW.

N. and C., the daughters of M., were jointly indebted to S., and the debt was secured by a deposit of title deeds of property belonging to C. M. appointed N. her executrix. Part of her property consisted of a mortgage debt, and after her will she purchased some real estate, which descended to N. and C. N. died, leaving a large amount of M.'s debts unpaid, and she made the plaintiff her executrix, so that the plaintiff was personal representative of both M. and of N. After the death of M., N. and C. borrowed of S. money on a deposit of title deeds, by which M.'s mortgage debt was secured, and of the title deeds of the real estate descended to N. and C. S. knew that the money was only partially wanted for the purposes of M.'s estate. There had been another

suit to administer the estate of M., and a decree in that suit; and part of the real estate of M. sold. On a bill by the plaintiff against S., seeking to recover the title deeds, held, that the mortgage by N. and C., as the heiresses of M., did not relieve the purchaser from the suit of M.'s representative. [*Carter v. Sanders*] . . . . 248

## IMPLICATION.

A testator gave his residue to his wife for her and her son's support, clothing and education, until he should attain twenty-one. If he died under twenty-one, then he gave all the interest of his Bank Stock to his wife for life; after her death, he gave all his property to his daughter. Held, that the son did not take any estate by implication on attaining twenty-one, but there was an intestacy. [*Fitzhenry v. Bonner*] . . . . 86

## INDEMNITY.

By a marriage settlement in 1834, the husband gave a bond for 2,000*l.* to the trustees, to be paid within six months of the marriage; to be left outstanding with the consent in writing of the wife and husband, and to be called in with the like consent. Another debt of 4,000*l.* was included in the settlement. The 2,000*l.* was never got in. The husband became bankrupt in 1836; the trustees proved for the debt, but afterwards joined in a supersedeas, on the bankrupt guaranteeing to his creditors 16*s.* 6*d.* in the pound. The other creditors were so paid; the trustees never took their composition. In 1838 the wife and husband gave a written consent that the debt should remain out on the husband's bond. No other consent was ever given.

The husband was again bankrupt in 1847. In 1834 the trustees had, at the instance of the husband (having no power to invest in the purchase of lands), purchased copyhold land and buildings with part of the 4,000*l*. The husband erected new and valuable buildings on the land at his own expense, increasing its value far more than 2,000*l*. There was no evidence to connect this outlay with the discharge of the bond debt. Held, that the trustees could not be indemnified out of the increase of value of the land caused by the husband's outlay upon it. [*Wiles v. Gresham*] . . . . . 258

#### INJUNCTION, PERPETUAL.

The plaintiff was in the enjoyment of ancient lights. There had been a building adjoining his, with a wall alleged to have been twelve feet high, and not interfering with his light. The defendant was about to pull down this wall, and rebuild it thirty feet high, which he alleged was the original height. The plaintiff's evidence as to the original height was more precise than the defendant's. The defendant said he never intended to build beyond the original height. The plaintiff proved that he threatened to build much beyond twelve feet. An injunction had been obtained, and the defendant never moved to dissolve it. At the hearing a decree for a perpetual injunction was granted, without requiring the plaintiff to try his right at law. [*Potts v. Levy*] . . . . . 272

#### INVESTMENT.

By a deed, *power was given* to trustees, and they were *required*, with the approbation of the tenants for life, to invest in the purchase of

leaseholds. Held, that it was compulsory on them to invest, when called upon to do so by the tenants for life. [*Cadogan v. Lord Essex*] . . . . . 227

#### JUDGMENT.

1. A., on the occasion of his advancing his client's money to B., had search made for judgments by his clerks; it did not appear whether, in the result of their search, the clerks found any judgment against B., or whether they communicated any thing to A. But in fact the search was made, and in fact there was a prior judgment entered up against B. A. afterwards took a mortgage of B.'s property, and then sold to C. Held, that the facts were sufficient evidence of notice of the judgment to A., so as to affect C. the purchaser, and let in the judgment. [*Procter v. Cooper*] . . . . . 1
2. Where a person deceased died domiciled in Ireland, leaving property in Ireland and England, and the same executors in both countries. Held, that an Irish judgment had priority over English simple contract creditors against Irish property remitted to England from the executors, and being there administered. [*Cook v. Gregson*] . . . . . 286

#### JURISDICTION.

Motion to amend after the cause was referred for hearing, by making a totally new case, inconsistent with the case originally made, refused with costs. Motion for leave to amend by making a case in effect that a part of a will was obtained by fraud, and the bequest void. Held, that such amendment could not be permitted, on the ground that if introduced it made a case

on which the Court had no power to adjudicate. [*Thompson v. Judge*] . . . . . 414

#### LEGACY.

A testator gave to his eight nephews and nieces, naming them, provided that if any of them should die in his lifetime without leaving children; or, as to the nephews, should survive him and die under twenty-one, without leaving children; or, as to the nieces, should survive him and die under twenty-one, without having been married, the share of each of them so dying, as well original as accruing, should go to the survivor and survivors, other and others. The testator revoked the trust created as regarded two of his nephews, A. and B. A. had attained twenty-one, survived the testator, and was living. B. attained twenty-one and died, living the testator. Held, that the limitations over of their shares were revoked, and that they went to the heir-at-law and next of kin. Gift to an executor of 100*l.*; gift by a codicil of 500*l.* in substitution thereof, then that gift revoked; the prior gift of the 100*l.* is not set up again. [*Boulcott v. Boulcott*] . . . . . 25

#### LIEN.

A. and B., solicitors in partnership, had a bill of costs against B. On their dissolution of partnership the costs were transferred to A. Afterwards A., at the request of the client, paid a debt for which she had deposited title deeds, and took possession of and afterwards retained the title deeds. He afterwards continued to act as her solicitor, and costs were incurred. Held, that as to the joint bill of costs there could be no lien in fa-

vour of A., if otherwise, there would have been lien; and, as to his separate bill of costs, he had taken the deeds as mortgagee and not as solicitor, and therefore he had no lien for costs. [*Vaughan v. Vanderstegen (Annesley's case)*] 409

#### MARRIED WOMAN.

A married woman having a life estate to her separate use in certain leasehold and personal property, with a general power of appointment by will only, appointed to children. Held, that, in the administration of her estate, a tradesman supplying her with goods while she concealed her marriage and dealt with him as a single woman, had a claim to be paid out of the appointed fund. [*Vaughan v. Vanderstegen*] 408

#### MASSES.

Trusts declared for certain Roman Catholic chapels, for saying masses and requiems for the souls of the donor and for other souls, and for the poor dead souls, and for other pious purposes. Held, that the gifts for masses, &c., for the dead were superstitious and void; that the pious uses could not, as religious uses, be separated from the others, and were therefore also bad; and that the words pious uses could not be construed charitable uses; consequently, the property given to these uses went to the residuary legatee of the donor. [*Heath v. Chapman*] . . . 417

#### MERGER.

A solicitor took a deposit of a policy from his client, under a parol agreement that it was to secure his then existing costs. Afterwards he made advances and took an assignment of the policy to secure them; the

deed saying nothing about the costs. Held, that the deed expressing no agreement that it was to include the costs, the possession under it merged the possession under the deposit, and the policy was only a security for the advances. [*Vaughan v. Vanderstegen*] . 289

#### MISJOINDER.

N. and C., the daughters of M., were jointly indebted to S., and the debt was secured by a deposit of title deeds of property belonging to C. M. appointed N. her executrix. Part of her property consisted of a mortgage debt, and after her will she purchased some real estate, which descended to N. and C. N. died, leaving a large amount of M.'s debts unpaid, and she made the plaintiff her executrix, so that the plaintiff was personal representative both of M. and of N. After the death of N., M. and C. borrowed of S. money on a deposit of the title deeds by which M.'s mortgage debt was secured, and of the title deeds of the real estate descended to N. and C. S. knew that the money was only partially wanted for the purpose of M.'s estate. There had been another suit to administer the estate of M., and a decree in that suit; and part of the real estate of M. sold. On a bill by the plaintiff against S., seeking to recover the title deeds deposited: held, that the plaintiff was not incapable of suing by being the representative of N., who, it was admitted, could not have sustained a bill. [*Carter v. Sanders*] . . . . . 248

#### MORTGAGOR AND MORTGAGEE.

1. On a foreclosure of an equitable mortgage of copyhold, the mort-

gagor, being the person to take the necessary steps for an effectual surrender, must pay the expenses of all such steps. [*Pryce v. Bury*] 41

2. In a mortgage power of sale it was required that notice should be given to the mortgagor, his heirs or assigns. The mortgagor died, leaving an infant heir. Held, that notice to the infant heir and her guardian was good notice. [*Tracey v. Lawrence*] . . . . 403

#### MORTMAIN.

A deed of gift to trustees of a rent-charge for charitable purposes duly enrolled, and otherwise legal on the face of it. The grantor lived many years afterwards and kept the deed; and the terms of the deed were never enforced. There was evidence of conduct to show the intention in the grantor and one of the trustees, that the deed was not to take effect till after the grantor's death; but no evidence of any specific agreement. Held, upon this evidence, that the deed was invalid. [*Way v. East*] 44

#### NOTICE.

A., on the occasion of advancing his client's money to B., had search made for judgments by his clerks; it did not appear whether, in the result of their search, the clerks found any judgment against B., or whether they communicated anything to A. But in fact the search was made, and in fact there was a prior judgment entered up against B. A. afterwards took a mortgage of B.'s property, and then sold to C. Held, that the facts were sufficient evidence of notice of the judgment to A., so as to affect C. the purchaser, and let in the judgment. [*Procter v. Cooper*] . 1

NUISANCE.

The plaintiff was in the enjoyment of ancient lights. There had been a building adjoining his, with a wall alleged to have been twelve feet high, and not interfering with his light. The defendant was about to pull down the ruins of this wall, and rebuild it thirty feet high, which he alleged was the original height. The plaintiff's evidence as to the original height was more precise than the defendant's. The defendant said he never intended to build beyond the original height. The plaintiff proved that he threatened to build much beyond twelve feet. An injunction had been obtained, and the defendant never moved to dissolve it. At the hearing, a decree for a perpetual injunction was granted, without requiring the plaintiff to try his right at law. [*Potts v. Levy*] . . . . 272

PARTICULARS OF SALE.

A vendor, in his particulars of sale, described certain cottages as part of Lot 6, and as in the occupation of the owners of the Sedghill Collieries, or their undertenants or workmen. By a further particular he stated, that "the mines and minerals within and under such of the collieries as were situate within certain townships were reserved to the owners thereof, with such powers and privileges as belonged to them." It turned out that the mine under Lot 6 was not the Sedghill Colliery, but the Hazelrigg Colliery, and the owners of the Hazelrigg Colliery had in some way obtained or long used a right to build and use cottages on Lot 6 without paying rent, except a trifling compensation for surface damage, and they had transferred

their right to the owners of the Sedghill Colliery. Held, that the particulars did not, on the face of them, convey such information as the vendor ought to have given; but inquiries were directed as to the circumstances under which the cottages were occupied, and whether the owners of the Sedghill Colliery had any right against the vendor. [*Brandling v. Plummer*] . . . . . 427

PARTITION.

On a commission under a partition decree as between co-heiresses, the eldest has no right of choice. The commissioners are to exercise their own discretion, and may take into account, in allotting, eldership or any other circumstance, and should only draw lots if they cannot on any grounds make a discretionary allotment. [*Canning v. Canning*] 434

PARTNERS.

See POWER OF.

PERSONAL REPRESENTATIVES.

1. Testator gave a life interest in certain funds, with remainder "to be equally divided between all my cousins german now existing, or their representatives." Held, there being nothing in the rest of the will to control the primary legal meaning of the word *representatives*, that it meant executors, and not next of kin; and the fund went to the executors or administrators of the testator's cousins german, as part of their personal estate. Investigation of the authorities and general doctrine in the construction of the word *representatives* in a will. [*Re Crawford's Trusts*] 230
2. N. and C., the daughters of M.,

were jointly indebted to S., and the debt was secured by a deposit of title deeds of property belonging to C. M. appointed N. her executrix. Part of her property consisted of a mortgage debt, and after her will she purchased some real estate, which descended to N. and C. N. died, leaving a large amount of M.'s debts unpaid, and she made the plaintiff her executrix, so that the plaintiff was personal representative both of M. and of N. After the death of M., N. and C. borrowed of S. money on a deposit of title deeds by which M.'s mortgage debt was secured, and of the title deeds of the real estate descending to N. and C. S. knew that the money was only partially wanted for the purposes of M.'s estate. There had been another suit to administer the estate of M., and a decree in that suit, and part of the real estate of M. sold. On a bill by the plaintiff against S. seeking to recover the title deeds: Held, 1st. That the plaintiff was not incapable of suing by being the representative of N., who, it was admitted, could not have sustained a bill. 2nd. That, though only personal representative of M., she could, under the circumstances, sue in respect both of her real and personal estate. [*Carter v. Sanders*]

248

### PLEA.

Bill for redemption by mortgagor of shares in a company transferred into the name of the mortgagee. Plea, that, at the time of the bill filed, all the shares were, by assignment, vested in another person. Held, the plaintiff had a title to sue, and the plea overruled. [*Winterbottom v. Taylor*] . . . 279

### PLEADING.

1. The case made by the bill was this:—It alleged title, under several instruments, to certain real estates settled thereby, one of such deeds creating a term to raise a sum of money not yet raised. It alleged possession or receipt of the rents in some of the defendants, and that they had possession of some of the deeds, and that they had given notice to tenants not to pay rent to the plaintiff, and threatened to distrain. It alleged that the trustee of the term refused to assign it to the plaintiff. It prayed, among other things, a declaration that under certain of the instruments the plaintiff was entitled to the estates; and that, on payment of the money to be raised by the term by him, he was entitled to a surrender or assignment of the term. Held, that there was an equity for that relief, if for no more, and the bill was not therefore demurrable. [*Saunders v. Richardson*] . . . 128
2. N. and C., the daughters of M., were jointly indebted to S., and the debt was secured by a deposit of title deeds of property belonging to C. M. appointed N. her executrix. Part of her property consisted of a mortgage debt, and after her will she purchased some real estate, which descended to N. and C. N. died, leaving a large amount of M.'s debts unpaid, and she made the plaintiff her executrix, so that the plaintiff was personal representative both of M. and of N. After the death of M., N. and C. borrowed of S. money on a deposit of the title deeds by which M.'s mortgage debt was secured, and of the title deeds of the real estate descended to N. and C. S. knew that the

money was only partially wanted for the purposes of M.'s estate. There had been another suit to administer the estate of M., and a decree in that suit, and part of the real estate of M. sold. On a bill by the plaintiff against S. seeking to recover the title deeds deposited: Held, 1st. That the plaintiff was not incapable of suing by being the representative of M., who, it was admitted, could not have sustained a bill. 2nd. That, though only personal representative of M., she could, under the circumstances, sue in respect both of her real and personal estate. [*Carter v. Sanders*] . . . . . 248

3. Bill for redemption by mortgagor of shares in a company transferred into the name of the mortgagee. Plea, that, at the time of the bill filed, all the shares were by assignment vested in another person. Held, the plaintiff had a title to sue, and the plea was overruled. [*Winterbottom v. Taylor*] . . . 279
4. A testator by his will gave to his married daughter 2,000*l.* for her separate use, "*to be in bar and full discharge of all other claims which she or her said husband might have or make on his estate.*" Held, that this was not like a case of election properly, nor a condition of forfeiture; but that the legacy was a discharge, *pro tanto*, of any rights which the wife, or her husband in her right, might have against the estate; and that the husband and wife were properly joined as plaintiffs. [*Hardingham v. Thomas*] 353

#### POWER.

1. By a marriage settlement in 1834, the husband gave a bond for 2,000*l.* to the trustees, to be paid within six months of the marriage; to be left

outstanding with the consent in writing of the wife and husband; and to be called in with the like consent. Another debt of 4,000*l.* was included in the settlement. The 2,000*l.* was never got in. The husband became bankrupt in 1836; the trustees proved for the debt, but afterwards joined in a superseedeas, on the bankrupt guaranteeing to his creditors 16*s.* 6*d.* in the pound. The other creditors were so paid; the trustees never took their composition. In 1838 the wife and husband gave a written consent that the debt should remain out on the husband's bond. No other consent was ever given. The husband was again bankrupt in 1847. In 1834 the trustees had, at the instance of the husband (having no power to invest in the purchase of lands), purchased copyhold land and buildings with part of the 4,000*l.* The husband erected new and valuable buildings on the land at his own expense, increasing its value far more than 2,000*l.* There was no evidence to connect this outlay with the discharge of the bond debt. Held—1st, that the trustees were liable for not getting in the money before 1836, if there was no consent; 2nd, that the wife's consent, in 1838, was not retrospective. [*Wiles v. Gresham*] . . . . . 258

2. By a deed, *power was given* to trustees, and they were *required*, with the approbation of the tenants for life, to invest in the purchase of leaseholds. Held, that it was compulsory on them to invest, when called upon to do so by the tenants for life. [*Cadogan v. Lord Essex*] 227
3. In a mortgage power of sale it was required that notice should be given to the mortgagor, his heirs



or assigns. The mortgagor died leaving an infant heir. Held, that notice to the infant heir and her guardian was good notice. [*Tracey v. Lawrence*] . . . . . 403

4. A married woman having a life estate to her separate use in certain leasehold and personal property, with a general power of appointment by will only, appointed to children. Held, that, in the administration of her estate, a tradesman supplying her with goods while she concealed her marriage, and dealt with him as a single woman, had a claim to be paid out of the appointed fund. [*Vaughan v. Vanderstegen*] . . . 408

#### POWER OF PARTNERS TO BIND EACH OTHER.

- A., a partner in a banking firm, advised B., a female customer of the bank, to sell out some Dutch stock, telling her the firm could procure for her better security, and that he had one in view: he said the money was in fact wanted by his own son, who was in trade. B. sold out the stock and paid the money into the bank; she then gave A. a cheque to draw it out and invest it. He drew it out and misapplied it and absconded, the interest having been regularly carried to her account in the meantime in the books of the bank, but by whom did not clearly appear. All these transactions took place at the banking-house, and B. had no acquaintance or dealings with A. except as banker and a member of the firm. The other partners did not appear to have known of them at the time they took place, but they did before A. absconded. Held, that they were not liable. [*Bishop v. Countess of Jersey*] . . . . . 143

#### PRACTICE.

1. Where, after replication filed, some defendants answer, if publication can be enlarged so as to embrace both sets of defendants, the course for putting the cause at issue as to the new defendants is not necessarily to withdraw replication, but to obtain leave to file a further replication. [*Rogers v. Hooper*] . . . . . 97
2. The 36th section of the Chancery Amendment Act, 15 & 16 Vict. c. 86, requires special reasons to be shown to the Court, affecting either particular witnesses or particular facts. [*Rogers v. Hooper*] . . . . . 97
3. The 53rd section of the 15 & 16 Vict. c. 86, has no application *after* decree; nor before decree, for bringing new parties before the Court; but only for bringing forward new facts between the same parties. If new parties are to be brought before the Court, there must be a supplemental bill. [*Commerell v. Hall. Same v. Bloomfield*] . . . . . 194
4. On the examination of witnesses orally under the 15 & 16 Vict. c. 86, if a document is put into the hands of a witness by a party examining him, the other side may require to see the document—1. If the witness is examined upon its contents generally. 2. If, although the document is originally shown to the witness merely to refresh his memory, questions are afterwards put relating to its contents. He may not require to see the document—1. If the document is put into the hands of the witness merely to refresh his memory, and nothing more is done. 2. If he is examined merely to prove the handwriting. [*Lord v. Colvin*] . . . . . 205

5. Costs of litigation in the Ecclesiastical Court for determining which is the testator's will, although ordered by the Ecclesiastical Court to be paid out of the estate, are postponed to the costs of administrators in this Court. [*Major v. Major*] . . . . . 281
6. Motion to amend after the cause was ripe for hearing, by making a totally new case, inconsistent with the case originally made, refused with costs. [*Thompson v. Judge*] 414
7. Motion for leave to amend by making a case which was, in effect, that a part of a will was obtained by fraud, and the bequest void. Held, that such amendment could not be permitted, on the ground that, if introduced, it made a case on which the Court had no power to adjudicate. [*Thompson v. Judge*] 414

**PRINCIPAL AND AGENT.**

- A. placed monies in the hands of her solicitor, who acted also for her as a money scrivener, undertaking to find securities for her. He placed the monies out on insufficient securities, misrepresenting to her their character. Held, that, as against him, if living, it would not have been, and as against his estate after his death it was not, a matter for an action for negligence, but a matter of account between principal and agent, and the client had a right to reject the charge for disbursements on the insufficient securities. [*Smith v. Pococke*] . . . . . 197

**PRINCIPAL AND SURETY.**

1. A creditor, whose debt was secured by the bond of the principal debtor,

and a surety, took, after the date of the transaction, further security from the principal debtor, and afterwards gave up that further security. Held, that this did not discharge the surety. [*Newton v. Chorlton*] . . . . . 333

2. A. and B. indebted as principal and surety to C. B. dies, and C., in a creditors' suit, obtains a decree against his estate. Afterwards C. sues A., and takes a judgment by arrangement, giving time without the knowledge of the surety. Held, that this did not discharge the surety. [*Jenkins v. Robertson*] . . . . . 351

**PRIORITIES.**

1. A., on the occasion of advancing his client's money to B., had search made for judgments by his clerks; it did not appear whether, in the result of their search, the clerks found any judgment against B., or whether they communicated anything to A. But in fact the search was made, and, in fact, there was a prior judgment entered up against B. A. afterwards took a mortgage of B.'s property, and then sold to C. Held, that the facts were sufficient evidence of notice of the judgment to A., so as to affect C., the purchaser, and let in the judgment. [*Procter v. Cooper*] 1
2. Vendor conveyed without receiving his purchase-money; the receipt of it was endorsed on the deed, and the title deeds delivered to the purchaser. The purchaser then made a mortgage by deposit, and absconded. Held, as between the vendor's lien for his unpaid purchase-money, and the right of the mortgagee, that the possession of the title deeds, and the fact of

the endorsement of the receipt on the deed, gave the mortgagee the better equity. Principles of the rule as to the effect of priority in point of time. [*Rice v. Rice*] 73

#### PROPERTY.

A testator gave specific real estate and his personal estate, *property* and effects to his wife for life; and after her death he gave the aforesaid specific real estate, with all monies, rights, credits, &c., "and all property whatever that should be remaining after his wife's decease," to his children. Held, that the children took his real estate in fee. [*Footner v. Cooper*] . . . . 7

#### REMOTENESS.

Testator gave a portion of his personal estate to the seven children of his son and his wife, naming them, together with every other child hereafter to be born of the said (wife) during the life of the said (husband), or within nine months after his decease, in equal shares, with benefit of survivorship." He then directed their maintenance with the dividends until the youngest should attain thirty; then upon trust for them respectively and the survivors and survivor of them in equal shares, "with power to the trustees to make such distribution sooner, if they think fit," provided the youngest child should have attained twenty-one. Held, that the period of division was the death of the husband, or the short period limited after his death; that the clause of maintenance till thirty, and postponing payment till then, did not disturb the previous vesting in the children surviving at the death of the husband, so as to in-

troduce remoteness, and that, consequently, one child having died living its father, her share went over to those who should be surviving at his death. [*Hodson v. Micklethwaite*] . . . . 294

#### REPLICATION.

Where, after replication filed, some defendants answer, if publication can be enlarged so as to embrace both sets of defendants, the course for putting the cause at issue as to the new defendants is not necessarily to withdraw replication, but to obtain leave to file a further replication. [*Rogers v. Hooper*] 97

#### REPRESENTATIVES.

Testator gave a life interest in certain funds, with remainder "to be equally divided between all my cousins german now existing, or their representatives." Held, there being nothing in the rest of the will to control the primary legal meaning of the word *representatives*, that it meant executors, and not next of kin; and the fund went to the executors or administrators of the testator's cousins german, as part of their personal estate. Investigation of the authorities, and general doctrine in the construction of the word *representatives* in a will. [*Re Crawford's Trust*] 230

#### REVOCATION.

A testator gave to his eight nephews and nieces, naming them: provided that, if any of them should die in his lifetime without leaving children; or, as to the nephews, should survive him and die under twenty-one, without leaving children; or, as to the nieces, should survive

him and die under twenty-one, without having been married, the share of each of them so dying, as well original as accruing, should go to the survivor and survivors, other and others. The testator revoked the trust created as regarded two of his nephews, A. and B. A. had attained twenty-one, survived the testator, and was living. B. attained twenty-one and died, living the testator. Held, that the limitations over of their shares were revoked, and that they went to the heir-at-law and next of kin. Gift to an executor of 100*l.*; gift by a codicil of 500*l.* in substitution thereof, — then that gift revoked; the prior gift of the 100*l.* is not set up again. [*Boulcott v. Boulcott*] . . . . 5

#### RIGHT TO SUE.

N. and C., the daughters of M., were jointly indebted to S., and the debt was secured by a deposit of title-deeds of property belonging to C. M. appointed N. her executrix. Part of her property consisted of a mortgage debt, and, after her will, she purchased some real estate, which descended to N. and C. N. died, leaving a large amount of M.'s debt unpaid, and she made the plaintiff her executrix, so that the plaintiff was personal representative both of M. and of N. After the death of M., N. and C. borrowed of S. money on a deposit of the title-deeds by which M.'s mortgage-debt was secured, and of the title-deeds of the real estate descended to N. and C. S. knew that the money was only partially wanted for the purposes of M.'s estate. There had been another suit to administer the estate of M., and a decree in

that suit, and part of the real estate of M. sold. On a bill by the plaintiff against S., seeking to recover the title-deeds deposited: Held, 1st. That the plaintiff was not incapable of suing by being the representative of N., who, it was admitted, could not have sustained a bill. 2. That, though only personal representative of M., she could, under the circumstances, sue in respect both of her real and personal estate. [*Carter v. Sanders*] . . . . . 248

#### SALE.

In a mortgage power of sale it was required that notice should be given to the mortgagor, his heirs or assigns. The mortgagor died, leaving an infant heir. Held, that notice to the infant heir and her guardian was good notice. [*Tracey v. Lawrence*] . . . . . 403

#### SATISFACTION.

A father, having a power of appointment in favour of children, appointed an estate, which was charged with certain legacies, to his daughter. He and she afterwards sold it for 3,700*l.*, and the father received the money, and with it paid off the charges on the estate. Afterwards she married, and on her marriage the father covenanted, as her portion, to pay, within twelve months after his death, 10,000*l.* on the trusts of the settlement, and to pay her 200*l.* a year in the mean time. The transaction of the appointment and sale was not made known to the husband. Held, that if the father ever intended the appointment for the benefit of the child (and the Court thought he did not), the set-

tlement was a satisfaction of the debt. [*Hardingham v. Thomas*] 353

#### SEPARATE ESTATE.

1. A married woman, having a life estate in personalty to her separate use, with a general power of appointment by will, does not, by exercising that power, make the property applicable to the payment of her engagements in the nature of debts, viz. of such engagements as would be charged on her separate estate. [*Vaughan v. Vanderstegen*] . . . . . 165
2. A married woman had a life estate in personalty to her separate use, with a general power of appointment by will, and, in default of appointment, over. She had also real estate similarly settled, except that, in default of appointment, the ultimate limitation was to her and her heirs, so that her husband should not be benefited by the curtesy. She borrowed money, fraudulently representing herself to be single, and purported to execute a mortgage of some of the settled real estate, with the ordinary covenant to pay. Afterwards, she by will appointed her freehold and personal estate chiefly to her children, and then died. Held, that, by the fraud, the married woman made the appointed estate liable as general assets, as if she had been a feme sole in respect of it; and that the mortgagee had a right not only to a charge on the mortgaged real estate to which she was entitled in remainder, but, if it was not sufficient, he was, by reason of the fraud, to rank as a creditor on her general assets, and to take the appointed personal fund, if there was not enough without. The decision in *Vaughan v. Vanderste-*

*gen*, ante, p. 165, confirmed, where there is no fraud. [*Vaughan v. Vanderstegen*] . . . . . 363

#### SOLICITOR.

A. and B., solicitors in partnership, held a bill of costs against B. On their dissolution of partnership the costs were transferred to A. Afterwards A., at the request of the client, paid a debt for which she had deposited title-deeds, and took possession of and afterwards retained the title-deeds. He afterwards continued to act as her solicitor, and costs were incurred. Held, that as to the joint bill of costs there could be no lien in favour of A., if otherwise, there would have been lien, and as to his separate bill of costs, he had taken the deeds as mortgagee and not as solicitor, and therefore had no lien for costs. [*Vaughan v. Vanderstegen (Annesley's case)*] . 409

#### SOLICITOR AND CLIENT.

1. A., B. and C. entered into partnership as bankers; C. was to be the managing partner. C. and E. entered into a bond to A. and B. for the due performance of the articles of partnership by C. After a few years A. retired, and a new partnership was entered into between B. and C., and C. and E. then gave a bond to B. to indemnify him, not only for the due performance of the articles by C., but against any loss which might occur in the management of the business. The terms of the bond were very stringent. B. was a solicitor and drew the bond, and sent it to C. and E. for their perusal, but gave no particular explanation of its effect. Held, that B. was not to be treated in the

matter as the solicitor of E., and that he was not bound to enter into any particular explanations of the tenor or effect of the bond. Discussions of the principles of the law, as to the duty of a party taking an indemnity to the party indemnifying him as surety. [*Small v. Currie*] . . . . . 102

2. A. placed monies in the hands of her solicitor, who acted also for her as a money scrivener, undertaking to find securities for her. He placed the monies out on insufficient securities, misrepresenting to her their character. Held, that as against him, if living, it would not have been, and as against his estate after his death it was not, a matter for an action for negligence, but a matter of account between principal and agent, and the client had a right to reject the charge for disbursements on the insufficient securities. [*Smith v. Pococke*] 197

#### SPECIALTY DEBT.

- A deed, appointing new trustees, recited, that they had agreed to become trustees, and then assigned the trust premises to them to hold on the trusts of the original deed. There was no express agreement or declaration that they would execute the trusts. Held, that a debt created by a breach of trust was not a specialty debt. [*Wynch v. Grant*] . . . . . 312

#### SPECIFIC PERFORMANCE.

1. An agreement was in the following words: "A agrees to pay 625*l.* for the cottage and stable, B. paying the expenses of the lease held by Mr. C. Signed A." Held, that such an agreement was not sufficient within the Statute of Frauds. A party contending for specific performance must show that his

conduct has been fair. If he has made material misrepresentations to the Defendant, it is no answer to say that the Defendant might have found out that they were misrepresentations. Specific performance is not of course, because there is a contract, but a relief in the nature of indulgence peculiar to the jurisdiction in equity. [*Cox v. Middleton*] . . . . . 209

2. Land was sold by the mortgagees of B., consisting of a circular plot, surrounded by a ring called the Park Drive. It was stipulated that, if used for building, villas of a certain size were to be built; that the ground between the villas and the Park Drive should be laid out in lawn or pleasure grounds down to the Park Drive; that a footpath of the width of fifteen feet should be laid out round the whole of the northern, southern and western boundaries of the said land. The Park Drive round the circular piece belonged to B.; the part outside had originally been his, but, with a small exception, had been sold by him. Held, that the condition about the footpath was too vague to be enforced, and that the purchaser was not bound to make it, and could not be restrained from using the land in any way inconsistent with making it. [*Taylor v. Gilbertson*] . 391

#### STATUTES.

1. The stat. 4 & 5 Will. 4, c. 22, requires, in order to exclude apportionment, either an express direction that there shall be none, or language so express in the terms of gift, that apportionment is clearly impossible consistently with it. Inference from the whole tenor and context of the will, is not suf-

- ficient to exclude the operation of the statute. [*Tyrrell v. Clark*] 86
2. The 36th section of the Chancery Amendment Act, 15 & 16 Vict. c. 86, requires special reasons to be shown to the Court, affecting either particular witnesses, or particular facts. [*Rogers v. Hooper*] . 97
3. A private charity act, passed shortly before the Charitable Trusts Act, 1853, gave power to the trustees in any matter in which they were to act, with the approbation of the Court of Chancery, to lay proposals at once before the judge in chambers. Held, that this was not repealed by the 17th sect. of the Charitable Trusts Act; but the necessity of a preliminary application to the Charity Commissioners was added. [*Re Bingley Free School*] . . . . 283

#### SUBSTITUTION.

A testator gave to his eight nephews and nieces, naming them provided that, if any of them should die in his lifetime without leaving children; or, as to the nephews, should survive him and die under twenty-one, without leaving children; or, as to the nieces, should survive him and die under twenty-one, without having been married, the share of each of them so dying, as well original as accruing, should go to the survivor and survivors, other and others. The testator revoked the trust created as regarded two of his nephews, A. and B. A. had attained twenty-one, survived the testator, and was living; B. attained twenty-one and died, living the testator. Held, that the limitations over of their shares were revoked, and that they went to the heir at law and next of kin. Gift to an executor of 100*l.*; gift by a codicil of 500*l.* in substitution

thereof, then that gift revoked; the prior gift of the 100*l.* is not set up again. [*Boulcott v. Boulcott*] . . . . . 25

#### SUPERSTITIOUS USES.

Trusts declared for certain Roman Catholic Chapels, for saying masses and requiems for the souls of the donor and for other souls, and for the poor dead souls, and for other pious purposes. Held, that the gifts for masses, &c., for the dead were superstitious and void; that the pious uses could not, as religious uses, be separated from the others, and were therefore also bad; and that the words pious uses could not be construed charitable uses; consequently, the property given to these uses went to the residuary legatees of the donor. [*Heath v. Chapman*] . . . 417

#### SUPPLEMENTAL STATEMENT.

The 53rd sect. of the 15 & 16 Vict. c. 86, has no application *after* decree; nor before decree, for bringing new parties before the Court; but only for bringing forward new facts between the same parties. If new parties are to be brought before the Court, there must be a supplemental bill. [*Commerell v. Hall: Same v. Bloomfield*]. 194

#### SURETY.

1. A., B. and C. entered into partnership as bankers; C. was to be the managing partner. C. and E. entered into a bond to A. and B. for the due performance of the articles of partnership by C. After a few years, A. retired, and a new partnership was entered into between B. and C., and C. and E. then gave a bond to B. to indemnify him not only for the due perform-

ance of the articles by C., but against any loss which might occur in the management of the business. The terms of the bond were very stringent. B. was a solicitor, and drew the bond, and sent it to C. and E. for their perusal, but gave no particular explanation of its effect. Held, that B. was not to be treated in the matter as the solicitor of E., and that he was not bound to enter into any particular explanation of the tenor or effect of the bond. Discussion of the principles of the law as to the duty of a party taking an indemnity to the party indemnifying him as surety. [*Small v. Currie*] . . . . . 102

2. A. and B. indebted as principal and surety to C. B. dies, and C. in a creditors' suit obtains a decree against his estate. Afterwards C. sues A., and takes a judgment by arrangement, giving time without the knowledge of the surety. Held, this did not discharge the surety. [*Jenkins v. Robertson*] . . . 351

#### SURVIVORSHIP.

Testator gave a portion of his personal estate to the seven children of his son and his wife, naming them, "together with every other child hereafter to be born of the said (wife) during the life of the said (husband), or within nine months after his decease, in equal shares, with benefit of survivorship." He then directed their maintenance with the dividends until the youngest should attain thirty; then upon trust for them respectively and the survivors and survivor of them in equal shares, "with power to the trustees to make such distribution sooner, if they think fit," provided the youngest child should have at-

tained twenty-one. Held, that the period of division was the death of the husband, or the short period limited after his death; that the clause of maintenance till thirty, and postponing payment till then, did not disturb the previous vesting in the children surviving at the death of the husband, so as to introduce remoteness, and that, consequently, one child having died living its father, her share went over to those who should be surviving at his death. [*Hodson v. Micklethwaite*] . . . 294

#### TITLE.

N. and C., the daughters of M., were jointly indebted to S., and the debt was secured by a deposit of title deeds of property belonging to C. M. appointed N. her executrix. Part of her property consisted of a mortgage debt, and after her will she purchased some real estate, which descended to N. and C. N. died, leaving a large amount of M.'s debts unpaid, and she made the plaintiff her executrix, so that the plaintiff was personal representative both of M. and of N. After the death of M., N. and C. borrowed of S. money on a deposit of the title deeds by which M.'s mortgage debt was secured, and the title deeds of the real estate descended to N. and C. S. knew that the money was only partially wanted for the purposes of M.'s estate. There had been another suit to administer the estate of M., and a decree in that suit; and part of the real estate of M. sold. On a bill by the plaintiff against S., seeking to recover the title deeds deposited: Held, 1st. That the plaintiff was not incapable of suing by being the representative of N., who, it was ad-



mitted, could not have sustained a bill. 2. That, though only personal representative of M., she could, under the circumstances, sue in respect both of her real and personal estate. 3. That the mortgage by N. and C., as the heiresses of M., did not relieve the purchaser from the suit of M.'s representative. 4. That as to the claim of S. that would depend on the result of any inquiry what part of the money advanced had been applied for the purposes of M.'s estate. [*Carter v. Sanders*] . . . 248

#### TITLE TO REDEEM.

Bill for redemption by mortgagor of shares in a company transferred into the name of the mortgagee. Plea, that, at the time of the bill filed, all the shares were, by assignment, vested in another person. Held, the plaintiff had a title to sue, and the plea overruled. [*Winterbottom v. Taylor*] . . . 279

#### TRUSTEE.

1. A trustee to uses, with power of sale, which uses, in the event, became executed in A. for an absolute estate in fee, was held not liable to A. for the purchase money of part of the estates, where the sale was conducted and the money received by the solicitor of the trustee, although the evidence was conflicting whether he acted in the matter by the direction of the trustee or by the direction of A.; the conveyance being executed by A. alone. A trustee of the legal estate in a mortgage in trust for A. absolutely, executed a re-conveyance, and signed a receipt for the mortgage money, and handed it to one of A.'s executors, who was also his own solicitor, and who afterwards misapplied the money. Held,

that the money having got into the hands of the executor, the trustee was not liable. [*Wagh v. Wyche*]

318

2. By a marriage settlement in 1834, the husband gave a bond for 2,000*l.* to the trustees, to be paid within six months of the marriage; to be left outstanding with the consent in writing of the wife and husband; and to be called in with the like consent. The 2,000*l.* was never got in. The husband became bankrupt in 1836; the trustees proved for the debt, but afterwards joined in a supersedeas, on the bankrupt guaranteeing to his creditors 16*s.* 6*d.* in the pound. The other creditors were so paid; the trustees never took their composition. In 1838 the wife and husband gave a written consent that the debt should remain out on the husband's bond. No other consent was ever given. The husband was again bankrupt in 1847. In 1834 the trustees had, at the instance of the husband (having no power to invest in the purchase of lands), purchased copyhold land and buildings with part of the 4,000*l.* The husband erected new and valuable buildings on the land at his own expense, increasing its value far more than 2,000*l.* There was no evidence to connect this outlay with the discharge of the bond debt. Held, 1st. That the trustees were liable for not getting in the money before 1836, if there was no consent. 2nd. That the wife's consent in 1838, was not retrospective. [*Wiles v. Gresham*]

258

3. A deed, appointing new trustees, recited, that they had agreed to become trustees, and then assigned the trust premises to them to hold on the trusts of the original deed.

There was no express agreement or declaration that they would execute the trusts. Held, that a debt created by a breach of trust was not a specialty debt. [*Wynch v. Grant*] . . . . . 312

#### TRUSTS [Pecatory].

Testatrix gave her residuary estate to A., his heirs, executors, administrators and assigns for ever, for his own use and benefit, as she had full confidence in him that if he should die without lawful issue he would, after providing for his widow during her life, leave *the bulk of her said residuary estate* to B., C., D. and E. equally. Held, that this language did not describe the subject of gift with sufficient certainty to create a pecatory trust. [*Palmer v. Simmonds*] 221

#### VENDOR AND PURCHASER.

1. Land was sold by the mortgagees of B., consisting of a circular plot, surrounded by a ring called the Park Drive. It was stipulated that, if used for building, villas of a certain size were to be built; the ground between the villas and the Park Drive should be laid out in lawn or pleasure grounds down to the Park Drive; that a footpath of the width of fifteen feet should be laid out round the whole of the northern, southern and western boundaries of the said land. The Park Drive round the circular piece belonged to B.; the part outside that had originally been his, but, with a small exception, had been sold by him. Held, that the condition about the footpath was too vague to be enforced, and that the purchaser was not bound to make it, and could not be restrained from using the land in

any way inconsistent with making it. [*Taylor v. Gilbertson*] . 391

2. A vendor, in his particulars of sale, described certain cottages as part of Lot 6, and as in the occupation of the owners of the Sedghill Collieries, or of their under-tenants or workmen. By a further particular he stated, that "the mines and minerals within and under such of the collieries as were situate within certain townships were reserved to the owners thereof, with such powers and privileges as belonged to them." It turned out that the mine under Lot 6 was not the Sedghill Colliery, but the Hazlerigg Colliery, and the owners of the Hazlerigg Colliery had in some way obtained or long used a right to build and use cottages on Lot 6 without paying rent, except a trifling compensation for surface damage, and they had transferred their right to the owners of the Sedghill Colliery. Held, that the particulars did not, on the face of them, convey such information as the vendor ought to have given; but inquiries were directed as to the circumstances under which the cottages were occupied, and whether the owners of the Sedghill Colliery had any right against the vendor. [*Brandling v. Plummer*] 427

#### VESTING.

A will contained a *gift* to children and the issue of deceased children, in language which clearly did not vest it in any till the youngest should have attained twenty-one. In a subsequent part there was a declaration as to vesting of the shares, expressed with much obscurity, and partially inconsistent with the language of the *gift*. Held,

that it must be rejected, and the clear gift must take effect; consequently, that the shares did not vest till the period prescribed, and the representatives of a child who died before the youngest attained twenty-one took nothing. [*Bickford v. Chalker*] . . . . 327

## WILL.

1. A testator gave specific real estate and his personal estate, *property* and effects to his wife for life; and after her death he gave the aforesaid specific real estate, with all monies, rights, credits, &c., "and all property whatsoever that should be remaining after his wife's decease," to his children. Held, that the children took his real estate in fee. [*Footner v. Cooper*] . . 7
2. A testator gave to his wife the income of his property in the funds, East India stock or elsewhere, for her life. The principal of all such funds and stock and property he bequeathed and devised as follows:—He bequeathed "one-half of my [*here there was a blank*] son Montague James, to be under his own control, and the other moiety in trust for the children of my daughter Fanny." He made his son executor and residuary legatee. Held, that no construction can be put on the blanks, and the son, as residuary legatee, took the whole. [*Taylor v. Richardson*] . . . 16
3. A testator gave to his eight nephews and nieces, naming them, provided that if any of them should die in his lifetime without leaving children; or, as to the nephews, should survive him and die under twenty-one, without leaving children; or, as to the nieces, should survive him and die under twenty-one, without having been married; the share of each of them so dying, as well original as accruing, should go to the survivor and survivors, other and others. The testator revoked the trust created as regarded two of his nephews, A. and B. A. had attained twenty-one, survived the testator, and was living; B. attained twenty-one and died, living the testator. Held, that the limitations over of their shares were revoked, and that they went to the heir-at-law and next of kin. Gift to an executor of 100*l.*; gift by a codicil of 500*l.*, in substitution thereof,—then that gift revoked; the prior gift of the 100*l.* is not set up again. [*Boulcott v. Boulcott*] . . . . 25
4. A testator gave his residue to his wife for her and her son's support, clothing and education, until he should attain twenty-one. If he died under twenty-one, then he gave all the interest of his bank stock to his wife for life; after her death, he gave all his property to his daughter. Held, that the son did not take any estate by implication on attaining twenty-one; but there was an intestacy. [*Fitzhenry v. Bonner*] . . . . 36
5. Testator gave a portion of his personal estate to the seven children of his son and his wife, naming them, "together with every other child hereafter to be born of the said (wife) during the life of the (husband), or within nine months after his decease, in equal shares, with benefit of survivorship." He then directed their maintenance with the dividends until the youngest should attain thirty; then upon trust for them respectively and the survivors and survivor of them in equal shares, "with power to the trustees to make such distribution sooner, if they think fit," provided the youngest child should

- have attained twenty-one. Held, that the period of division was the death of the husband, or the short period limited after his death; that the clause of maintenance till thirty, and postponing payment till then, did not disturb the previous vesting in the children surviving at the death of the husband, so as to introduce remoteness, and that, consequently, one child having died living its father, her share went over to those who should be surviving at his death. [*Hodson v. Micklethwaite*] . . . . 294
6. A will contained a gift to children and the issue of deceased children, in language which clearly did not vest it in any until the youngest should have attained twenty-one. In a subsequent part there was a declaration as to the vesting of the shares, expressed with much obscurity, and partially inconsistent with the language of the *gift*. Held, that it must be rejected, and the clear gift must take effect; consequently, that the shares did not vest till the period prescribed, and the representatives of a child, who died before the youngest attained twenty-one, took nothing. [*Bickford v. Chalker*] 327

WORDS.

1. A testator gave specific real estate, and his personal estate, *property* and effects to his wife for life,

- and after her death he gave the aforesaid specific real estate, with all monies, rights, credits, &c., "and all property whatever that should be remaining after his wife's decease," to his children. Held, that the children took his real estate in fee. [*Footner v. Cooper*] . 7
2. Testator gave a life interest in certain funds, with remainder "to be equally divided between all my cousins german now existing, or their representatives." Held, there being nothing in the rest of the will to control the primary legal meaning of the word *representatives*, that it meant executors, and not next of kin; and the fund went to the executors or administrators of the testator's cousins german, as part of their personal estate. Investigation of the authorities and general doctrine in the construction of the word *representatives* in a will. [*Re Crawford's Trusts*] . . . . . 230
3. Testatrix gave her residuary estate to A., his heirs, executors, administrators and assigns for ever, for his own use and benefit, as she had full confidence in him that if he should die without lawful issue he would, after providing for his widow during her life, leave *the bulk of her said residuary estate* to B., C., D. and E. equally. Held, that this language did not describe the subject of gift with sufficient certainty to create a precatory trust. [*Palmer v. Simmonds*] . 221

**LONDON:**  
**PRINTED BY C. ROWORTH AND SONS, BELL YARD,**  
**TEMPLE BAR.**











